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No.

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In The

Supreme Court of the United States

October Term, 1995

GARY FROST and GEORGE JOHNSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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11 pp

QUESTIONS PRESENTED FOR REVIEW

I. Was it error to allow the issue of extortion to be tried by the jury, where the communication in question threatens exposure of misconduct of a public official, if that official does not resign, considering:

(a) The state where the offense is alleged to have occurred does not recognize that the holder of a public office has a property right in the office, the remuneration from the office, nor the papers produced by the office holder; and,

(b) The communication threatening such exposure is not inherently wrongful and has the protection of freedom of speech?

II. Was it error for the Court of Appeals to decide that an argument which it found to be "ill advised" by the prosecutor, which argument compared petitioners to Nazis and war criminals as well as indicating that petitioners would have hurt people in addition to the victim alleged in the indictment, where it is apparent:

(a) That the case was close on the question of guilt, with the jury taking in excess of 18 hours to return a verdict and it being necessary for the trial court to given an Allen charge;

(b) The evidence failed to demonstrate in any manner how petitioners were involved in conduct such as that of Nazis and war criminals, or that they were doing, or would do, anything to hurt additional persons; and,

(c) Such argument clearly went beyond the bounds of any evidence presented at trial?

III. Were petitioners deprived of their right to effective argument by counsel, in violation of their right to due process of law and, specifically, the Sixth Amendment to the Constitution by the Court of Appeals' not reversing all convictions based upon the trial court's failing to give a specific charge, after having promised to give such a charge and after counsel depended upon the court's promise?

IV. As to petitioner Johnson only, did the Court of Appeals fail to apply this court's decision in *United States v. Gaudin, infra*, which was rendered after trial but before the decision of the Court of Appeals, thereby violating the mandate of this court in *Bradley v. School Board of City of Richmond, infra*?

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The petitioners, Gary Frost and George Johnson respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit which denied the timely Petition for Rehearing in this case on June 6, 1996.

OPINIONS BELOW

On August 25, 1995, the Court of Appeals for the Eleventh Circuit affirmed the convictions of the petitioners Gary Frost and George Johnson for the offenses of obstruction of commerce in violation of 18 U.S.C. § 1951, extortion by use of the U.S. Mail in violation of 18 U.S.C. § 876, and conspiracy to commit extortion by use of the U.S. Mail, in violation of 18 U.S.C. § 371. The Court of Appeals also affirmed the conviction of George Johnson for the offense of perjury in violation of 18 U.S.C. § 1623. The court below reversed the sentences imposed, ruling that the district court had erred in using sentencing guidelines for extortion by force or threat of injury or serious bodily harm. On March 19, 1996, subsequent to petitions for rehearing, but without the benefit of rehearing, the Court of Appeals modified this decision by withdrawing that portion of its decision affirming the Hobbs Act conviction, 18 U.S.C. § 1951 and vacating petitioners convictions and sentences on that count of the indictment. Copies of those opinions are included in this petition as Appendix B. Petitioners timely petitioned for rehearing and suggestion for en banc reconsideration under Federal Rule of Appellate Procedure 40. This request was denied on June 6, 1996. A copy of the order denying the Petition for Rehearing is included as Appendix A.

STATEMENT OF JURISDICTION

The order of the Court of Appeals for the Eleventh Circuit denying Mr. Frost's and Mr. Johnson's Petitions for Rehearing

was filed and rendered on June 6, 1996. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The federal statutes involved in this matter are 18 U.S.C. §§ 876 and 1623. The federal constitutional provisions involved are the First and Sixth Amendments to the Constitution. In relevant part these provisions are as follows:

18 U.S.C. § 876:

> Whoever with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, . . . , addressed to any other person and containing any threat to injure the property or reputation of the addressee . . . shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1623:

> (a) Whoever under oath ... in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined under this title or imprisoned not more than five years, or both.

First Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On May 27, 1993, a superseding indictment was returned by a Grand Jury of the United States District Court for the Middle District of Georgia. The indictment charged petitioners, along with then Mayor Edward Wayne Martin, who is not a party to this petition, in three counts with the offenses of obstruction of commerce by extortion in violation of 18 U.S.C. § 1951, extortion by use of the U.S. Mail in violation of 18 U.S.C. § 876, and conspiracy to commit extortion by use of the U.S. Mail in violation of 18 U.S.C. § 371. Mr. Johnson was also charged with a fourth count of perjury, in violation of 18 U.S.C. § 1623. On September 1, 1993, a jury convicted Mr. Frost and Mr. Johnson on all counts with which they were charged.

On November 10, 1993, the Honorable Wilbur D. Owens, Jr., (the trial judge) imposed sentences that included Mr. Frost receiving a sentence of 33 months imprisonment to be followed by a period of 3 years supervised release and Mr. Johnson receiving a period of imprisonment of 51 months to be followed by a period of 3 years supervised release. Both Mr. Frost and Mr. Johnson appealed their convictions and sentences to the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. §§ 1291 and 1294(1).

The Court of Appeals affirmed the convictions but reversed the sentences in a decision which ruled that the trial court had misapplied the federal sentencing guidelines. At the time of their release, both petitioners had served several more months than they would have served had the guidelines been applied correctly.

The victim of this alleged extortion was Warner Robins, Georgia, City Councilman William Douglas. On April 16, 1991, Mr. Douglas was engaged in sexual activity with a woman who was not his wife in an automobile in an outdoor area of vacant property belonging to the City of Warner Robins, Georgia. His activity had been under surveillance by various members of the Warner Robins Police Department, including Mr. Johnson, who was then Chief of Police, and Mr. Frost, who was a Police Major. This surveillance was also participated in by two other non-police city employees. A videotape was made of Mr. Douglas and the woman in the vehicle on April 16, 1991. A copy of this videotape was delivered by Mr. Johnson, Mr. Frost and the other two city employees to Mayor Edward Wayne Martin on the day it was made. On or about April 1, 1991, a copy of this videotape was received by Councilman Douglas in the mail. With the tape was a note telling him:

> Your [sic.] a disgrace! To our town, to the church. Resign From the Counsel [sic.] immediately or the mayor and your wife gets a copy of this.

Petitioners acknowledged at trial that they participated in performing the surveillance on Councilman Douglas, including making a videotape of his sexual activities performed in an automobile, during the daytime in a public place, but they disputed and denied both that they participated in the mailing of any blackmail note and that they had no knowledge of that mailing.

On appeals before the Court of Appeals for the Eleventh Circuit petitioners argued among other issues that:

(1) The trial court had erred by not granting motions to dismiss and judgments of acquittal because of: (a) the absence of "money or other thing of value" as the object of extortion, and (b) the lack of a sufficient wrongful threat to cause the type of coercion or fear that is prohibited by the federal extortion statutes, 18 U.S.C. §§ 876 and 1951;

(2) That the government had failed to prove a sufficient nexus with interstate commerce to support the conviction under the Hobbs Act (18 U.S.C. § 1951). In its initial opinion which affirmed the convictions and reversed the sentences of these petitioners, the Court of Appeals rejected this argument without opinion and rejected petitioners' appeal on the second two issues. Then, subsequent to petitioners' filing motions for rehearing, the panel of the Court of Appeals modified its initial decision by vacating the convictions under the Hobbs Act and ruling that the trial court should have granted the motions for judgment of acquittal because the government had failed to prove a sufficient nexus with interstate commerce;

(3) The trial court erred by failing either to grant a mistrial or to give a cautionary instruction to the jury as a consequence of the prosecuting attorney's, in the government's rebuttal argument, drawing a comparison between these petitioners and Nazis, Third World dictators, and other war criminals, as well as suggesting that petitioners would have hurt people in addition to Mr. Douglas; and

(4) Harmful error resulted from the trial judge's, prior to argument, promising defense counsel that the jury would be charged that the surveillance of Mr. Douglas, including the videotaping, was a legal surveillance, and then failing to give that charge.

REASONS FOR GRANTING THE WRIT

I.

THE INDICTMENT FAILED TO ALLEGE, AND THE GOVERNMENT FAILED TO PROVE, ESSENTIAL ELEMENTS OF THE OFFENSES.

It was error for the District Court to allow the extortion and conspiracy to extort charges to be considered by the jury because of (1) the total absence of "money or other thing of value" being the object of any extortion, and, (2) the lack of a wrongful threat sufficient to cause a coercion or fear that is to be protected against by the federal extortion statute, 18 U.S.C.A. § 876. These elements were lacking both in the allegations of the indictment and the evidence presented at the trial.

Likewise, because the grand jury which heard Mr. Johnson's testimony was investigating a matter outside its jurisdiction (*i.e.*, a matter which was not, and never could have been, a federal offense), the perjury charge against Mr. Johnson should have been dismissed by the District Court.

A. Absence of "Money or Other Thing of Value" Being the Object of any Extortion

The federal statute dealing with "mailing threatening communications", 18 U.S.C. § 876 prohibits extorting "money or other thing of value" from any person. The obvious object of this alleged extortion was to obtain Mr. Douglas's resignation from City Council. Petitioners urge this Court to consider that for the purpose of determining whether a city council post constitutes "money or other thing of value" for this purpose, that the federal law looks to the law of the State where the council post is held, to determine the interest of such public office holder. In

the case of *Warren v. Crawford*, 927 F.2d 559, 562 (11th Cir. 1991), the Eleventh Circuit, citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569, 92 S. Ct. 2701, 2703, 33 L. Ed. 2d 548 (1972) held that state law determines whether a public employee has a property interest in a job. Under the law of Georgia, public office is considered to be a public trust; it is not the property of the incumbent; and the office holder has no vested right in the compensation of his office, *Burpee v. Loan*, 216 Ga. 434, 117 S.E. 2d 33 (1960); *Warren v. Crawford, supra*. The government's contention that Councilman Douglas had the right to transact business without interference is inconsistent with Georgia law which provides that such an office holder has no property right in the books and papers pertaining to his office and, although he may have the right under certain circumstances to a notice and hearing, he has no vested right in the office, *Walton v. Davis*, 188 Ga. 56, 2 S.E. 2d 603 (1939).

Even though the state law in Georgia recognizes that an elected official cannot have his job taken from him without meeting the requirements of due process, *City of Ludowici v. Stapleton*, 258 Ga. 868, 375 S.E.2d 855 (Ga. 1989), petitioners urge the Court to consider that a public office holder in Georgia does not under the law of that state have such a vested right in his job, the remuneration therefrom or the business thereof to constitute such a thing of value as is to be protected by federal law from the exposure of his conduct.

18 U.S.C. § 876 prohibits the use of the mails with the intent to extort "money or other thing of value . . . ." Under the rule of *ejusdem generis*, the general term "other thing of value" is restricted to things analogous to the specific term "money," that is, "other things of (monetary) value." In our economic and legal system, all "property," whether tangible or intangible has monetary value.

While we are only human, and our research may well be flawed, we have thus far found only two federal appellate decisions in which the courts have specifically held that the subject matter of an extortion may be something of abstract (rather than concrete monetary) value: *United States v. Zouras*, 47 F. 2d 1115 (7th Cir. 1974); and *United States v. Nilsen*, 67 F.2d 53 (11th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1856.

Neither *Nilsen* nor *Zouras* seem to address the specific arguments we make, though both do allow "value" to include abstract non-monetary value. By allowing value to exist in an abstract mental sense rather than an objective monetary sense, both decisions seriously implicate (if not outright infringe upon) two basic constitutional rights. First, such a concept is so vague as to impinge upon Fifth Amendment due process concepts. Moreover, by holding that the defendant's act of sending the letter demonstrated value, *Nilsen* made the words "any money or other thing of value" in § 876 meaningless. If by the mere act of mailing a communication, the defendant could establish value, the statute need only have read: "Whoever uses the mails to transmit any communication] . . . containing any threat to injure the property or reputation of [another . . ." is guilty of a felony. It is a basic tenet of statutory construction that verbage is not considered surplusage unless no other construction is possible. Secondly, when, as in the present case, the purported extortion is carried out exclusively by means of a communication directed toward a lawful political objective, *Nilsen* creates serious First Amendment problems in the statute's application. In such circumstances, the statute may well be facially invalid if construed as it was by the *Nilsen* panel and, by implication, by the Court of Appeals in the present case. *See, e.g., Wurtz v. Riley*, 719 F. 2d 1438 (9th Cir. 1983); *Rogers v. United States*, 422 U.S. 35, 95 S. Ct. 2091, 4 L. Ed. 2d 1, opinion of Marshall, J., concurring 422 U.S. at 41 (1975). *Cf. United States v. Emmons*, 410 U.S. 396, 96 S. Ct. 1007, 35 L. Ed. 2d 379 (1973), holding that the

Hobbs Act may not be applied to union activity the objective of which was lawful, even though the methodology utilized by the union constituted the use of unlawful force.

Finally, we note that, when construing another federal criminal statute (18 U.S.C. § 641, Theft of Government Property) the courts which have considered the issue have uniformly construed the similar phrase "any record, voucher, money or thing of value" (emphasis added) to mean a thing of monetary value. *See United States v. Matzkin*, 14 F. 3d 1014 (4th Cir. 1994); *United States v. Tobias*, 836 F. 2d 449 (9th Cir. 1988); *United States v. Lambert*, 446 F. Supp. 890 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2nd Cir. 1979), *cert. denied*, 444 U.S. 871. Nowhere are we enlightened as to why such simple, straight forward phraseology should mean one thing in § 641 and another in § 876, and we respectfully submit that it should not, and further, that the decision of the court below, and *Zouras* and *Nilsen* as well, are in direct conflict with *Matzin*, *Tobias*, *Lambert* and *Girard*.

B. Insufficient Allegation and Proof of a Threat Causing Coercion or Fear Which Is Subject to Federal Protection

The indictment failed to charge, and the evidence at trial failed to prove, that anyone directed a threat to Mr. Douglas in a manner that violated any federal law. For example, the government contends that property to be extorted may be intangible as well as tangible. *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979), *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973), *cert. denied*, 411 U.S. 951, and also contends that a public office holder threatened with the loss of his office through extortion would suffer the loss of a "thing of value" for purposes of 18 U.S.C. § 876 citing *United States v. Nilsen*, 967 F.2d 539 (11th Cir. 1993), *cert. denied*, 113 S. Ct. 1856 (1993).

All of these extortion cases argued by the government involve circumstances where persons accused of extortion were involved in conduct that was inherently wrong, such as attempting to gain funds, favorable government contracts, and similar benefits for themselves. Those cases are inherently different from this case, where the person writing the note only undertook to obtain the councilman's resignation, with no apparent economic, monetary or other tangible or intangible benefit or harm.

The federal appellate courts have recognized that an unlawful extortion occurs only where the threat of force, violence or fear is inherently wrongful. *United States v. Buffy,* 899 F.2d 1402 (4th Cir. 1990). These courts have also recognized that an extortion statute can be applied in an unconstitutionally overly broad manner if the application results in the suppression of First Amendment rights of free speech. For example, the mere fact that a communication induces or coerces action in another does not remove it from First Amendment protection. *Wurtz v. Risley,* 719 F.2d 1438 (9th Cir. 1983). There is well reasoned and persuasive authority which demonstrates the lack of merit in applying extortion type statutes to prevent exposure of office holders because of the asence of property in that job, *People v. Robinson,* 20 P.2d 369 (Cal. 1993). There is similar holding that extortion statutes should not be used to suppress the freedom of speech of those communicating threats of exposure to obtain resignations from public office, where the threat is not wrongful, nor unjustified, nor made in bad faith, *People v. Deem,* 100 Cal. Rptr. 311 (Cal. 1972).

The threat of exposure if an official does not resign, when no unlawful object or purpose is apparent, is lacking in the wrongfulness required under the law for extortion to exist.

The Court of Appeals did not consider that this issue merited

discussion in its opinion. *United States v. Frost & Johnson*, at 3205 and 3211 (11th Cir. 1995), but that court directed the government to brief the extortion issue in response to the petitioners' motions for rehearing. In the government's brief dated September 28, 1995, on page 3 thereof, the government stated:

> It strains common sense to argue that the wrongful premature loss of an elected office and its salary, as well as public reputation, as a result of extortion is not a loss of a thing of value.

Significantly, in using the word "wrongful", the government acknowledged that requirement. The error in the application of this extortion statute by the government, the trial court, and the Court of Appeals is that it is not the economic loss to Mr. Douglas from his job that would make such conduct wrongful extortion. The threat was not seeking to obtain Mr. Douglas' job or any item of property, tangible or intangible. The threat was intended merely to make Mr. Douglas resign from a position in which he held no vested interest and was in no way intended to obtain anything for the communicator of the threat.

Petitioners respectfully urge this Court to consider that there is a distinction between (1) a communication threatening exposure if a public official does not resign and (2) an unlawful threat to expose conduct unless a wrongful object, tangible or intangible, is obtained by or for the communicator. The distinction under the law is one of whether or not the communicator is entitled to the object sought. For example, it would clearly be wrong if the communicator threatened exposure in exchange for money or other tangible or intangible benefit. However, to allow prosecution where the object of the communication is to obtain resignation from a public office

amounts to an unconstitutional application of the extortion statute in a manner that suppresses the communicator's freedom of speech. Moreover, it permits federal intrusion into local politics in a manner that causes an overly broad and vague application of the federal statute. There must be a wrongful, unlawful objective of the communication and that is simply lacking in this case.

The decision of the Court of Appeals on this issue is in conflict with the decision of the Georgia court of last resort in that it impliedly declares a public office to be a thing of value. It is also inconsistent with other federal and state appellate decisions which require that a communication be of a wrongful nature to be extortion. It furthermore involves an application of the federal statute which causes that statute to be in conflict with the First Amendment of the Constitution of the United States.

II.

THE APPELLATE COURT ERRED IN NOT RECOGNIZING THE HARM RESULTING FROM THE PROSECUTOR'S ARGUMENT WHICH COMPARE PETITIONERS TO NAZIS AND OTHER WAR CRIMINALS, AND SUGGESTING THEY WOULD HURT PEOPLE IN ADDITION TO MR. DOUGLAS.

This was a case where the surveillance on Mr. Douglas was done by these petitioners in a manner that the District Court said was legitimate. (50a-54a, 55a, 56a-57a). The District Court noted that the allegation of the government was only that the fruits of the surveillance were used for an illegal purpose. (49a-50a). Yet the government argued to the jury that: "Nothing about that investigation was legitimate from start to finish." (65a).

Both petitioners testified that they were performing the

surveillance under orders from their superiors, Mr. Johnson from Mayor Martin, and Mr. Frost from Chief Johnson. Consequently, the prosecution saw the opportunity to categorize this as a "following orders defense" case. The prosecution then in its rebuttal argument, on two occasions, compared petitioners to criminals in other cases in the following manner.

(1) Analogy was drawn between the defense raised by petitioners and that used at Nuremberg and in Vietnam (presumably by William Calley). (66a).

(2) The government continued this improper argument by stating, "What they did to William Douglas and *what they would have done to others* is no different than what the Gestapo did in World War II." (Emphasis added.) The prosecutor then argued, "it is no different than what authorities in Third World countries do to other people under their protection." (67a).

The District Court refused to grant a mistrial on these grounds (67a-74a), and refused to give a cautionary instruction indicating that this was "tit-for-tat." (74a). The Court of Appeals recognized that the prosecutor's remarks were not proper, calling them, "ill advised", (22a), but that court felt that petitioners had not shown that the prosecutor's remarks had rendered their trial fundamentally unfair. Petitioners appealed below using the following arguments, which were rejected by the Court of Appeals:

(1) A thorough review of the closing arguments of the petitioners clearly demonstrates that petitioners made no arguments whatsoever for which these improper comments could be said to be in rebuttal. This was not a "tit-for-tat" situation as the trial court stated. Nothing about petitioners' evidence at trial or counsels' argument justified the prosecutor's improper argument.

(2) The government's reference to what petitioners would have done to others far exceeds the scope of any evidence presented in the case. This is the type of argument to be condemned as wholly irrelevant as to any facts or issues in the case and which is clearly prohibited under the decisions of this court. *See Viereck v. United States*, 318 U.S. 236, 63 S. Ct. 561, 566 (1942).

(3) This was obviously a close case on the question of guilt. Because both the government and the District Court considered not the surveillance but the fruits of the surveillance to be the illegality involved (an petitioners participated only in the surveillance), it was necessary for the government to prove that petitioners knew of the illegal nature of the purpose of the surveillance and that extortion was being proposed. *United States v. Inigo*, 25 F.2d 641 (3rd Cir. 1991). The government sought to meet this burden through the testimony of the witness Street, who testified that Mr. Frost called him shortly after the package containing the tape and note were delivered to Mr. Douglas. The evidence presented against petitioner Mr. Johnson in this respect involved primarily the testimony of the witness Dan Hart, who testified to the effect that Mr. Johnson had told him (Hart) that "they had some pictures on Douglas and that he would not run for Mayor." However, this purported conversation was supposed to have occurred long after the tape was mailed to Douglas. After hearing all of the evidence and the argument of counsel, the jury required at least 18 hours to reach verdicts of guilt. Petitioners suggest that in a case this close, such a prejudicial argument could be the very reason the jury came down on the side of guilt, especially where the trial court has taken no precaution to remove the taint of this prejudicial argument.

(4) The government's argument expanded the issues to include the question of the legality of the surveillance, which the

government had previously stated to the court was not in question. (Pre-Trial Conference of August 5, 1993, 33a). That argument went, not to the question of knowledge of the purpose of the surveillance, but to the legality of the surveillance itself. This alone, under all applicable standards for measuring this issue, makes it apparent that the trial was fundamentally unfair. The remarks were calculate to inflame the jury against these petitioners. Such argument is precluded under the prior decisions of this Court. *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629 (1937), states in part that, although prosecutors may strike hard blows, they are not at liberty to strike foul ones. Such an argument in this case expanded the magnitude of any conduct involved beyond that authorized by the evidence. The fact that petitioners were police officers inherently made them persons who are by law and by their oaths obligated to follow legitimate orders. The prosecutor's argument sought to draw an analogy between the crime charged and that involving other defendants in other cases involving very heinous crimes. Such a procedure is contrary to the decisions of this Court, *Berger v. United States*, *supra*, the decisions of the other federal circuits, *Brown v. United States*, 370 F.2d 242 (D.C. Cir. 1966), and *United States v. Phillips*, 476 F.2d 539; and, in fact, the decisions of this particular Court of Appeals, *United States v. Smith*, 918 F.2d 1551 (11th Cir. 1990) and *United States v. Blakey*, 14 F.3d 1557 (11th Cir. 1994), a case in which the prosecutor had argued "ladies and gentlemen this man is a professional criminal." There the trial court had made an attempt to correct the error with cautionary instruction. The Court of Appeals recognized that the comment went outside the evidence and impugned the defendant's character with an inaccurate characterization. This same Court of Appeals further recognized that this characterization of the accused, not being based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations. The court then took notice of the fact that the deliberations of the jury extended for a significantly long period

of time. The District Court had given an *Allen* charge, as was done in this case, and the jury then returned a verdict of guilt. It was then concluded that in the context of the entire record and considering the length of the jury's deliberations, that the prosecutor's comments during the closing argument denied the accused a fair trial in spite of the fact that the trial judge had given a cautionary instruction.

The Court of Appeals decision in *United States v. Blakey, supra,* is totally irreconcilable with the decision it rendered in this case. The same court determined in *Blakey* that to refer to a defendant as a "professional criminal" was so prejudicial as to be beyond repair by the trial court's cautionary instruction. However in this case, the same court ruled that a comparison of petitioners to Nazis and war criminals and the suggestion that petitioners would have done bad things to other people, items not in evidence, even without a cautionary instruction, was not harmful. Within the federal circuits there presently exists a situation where, especially in close cases, prosecutors feel at liberty to make inflammatory and prejudicial arguments with confidence that there is little likelihood of convictions being reversed, as there is no definite standard as to when their errors are held to be harmful.

(5) This argument which in effect attacked the legality of the surveillance contributed to the unfairness of the trial because the trial court had in so many ways prevented petitioners from presenting evidence that justified and defended the legality of the surveillance. For example, as Mr. Frost indicated in his enumeration of error no. 4 in the Court of Appeals, the trial court had limited the introduction of evidence as to the legality of the surveillance. The trial court would not allow presentation of evidence as to the history of Mr. Douglas' suspicious conduct, which drew the attention of police to him in the past. Cross-examination of Mr. Douglas relative to his lady companion's job, to establish why Mr. Frost kept the surveillance secret, was not

allowed. Cross-examination to establish lack of motive on the part of Mr. Frost was not allowed. A proffer of Mr. Frost's oath of office and statutes requiring him to follow orders were not allowed as evidence. The introduction of expert testimony to establish the validity of the surveillance was not allowed by the trial court.

III.

IT WAS ERROR FOR THE COURT OF APPEALS NOT TO REVERSE THE CONVICTIONS BECAUSE THE TRIAL COURT DEPRIVED PETITIONERS OF DUE PROCESS AND SPECIFICALLY THEIR SIXTH AMENDMENT RIGHT TO EFFECTIVE ARGUMENT, AS THE TRIAL COURT HAD PROMISED TO CHARGE THAT THE SURVEILLANCE WAS LEGAL, AND FAILED TO GIVE THAT CHARGE.

It was clear at the trial that it was necessary for petitioners to defend the surveillance. Although the trial judge, at an in-chambers conference prior to the introduction of any evidence, expressed the view that no claim was being made by the government that the making of the videotape was illegitimate, the case was tried in such a manner as to make it appear that the surveillance was in question. For example, during the trial, a juror had written out a question for the court and the judge gave the following instruction:

> Ladies and gentlemen, one of you has asked that a question be propounded as to whether or not this was an acceptable way of doing business. Of course the government alleges in the charges that this is not only unacceptable, it is a criminal way of handling the matter. Of course it is up to you to listen to

> the evidence and decide who did what, if anything, and why, and from the criminal intent standpoint, was it done. So bear in mind that this is what is at the heart of the case. The government alleges that this was all handled in a way that violates the criminal laws of the United States.

(47a, 48a).

Although the government had indicated that the surveillance was not a crime at the pre-trial conference, (33a), the presentation of the evidence made it clearly appear to petitioners that it was necessary to defend the surveillance. The trial court initially expressed the view that the surveillance was legitimate. (37a-45a). The trial court then used the proposition,(46a-47a), that the surveillance was legal to justify decisions on evident.iary matters. The court refused a proffer of testimony of Deputy West as a witness to Mr. Douglas' prior conduct under suspicious circumstances as a justification for the investigation. The court in fact restricted Mr. Frost's opening statement in that regard. The trial court would not allow cross-examination of Mr. Douglas relative to his lady companion's job, to establish why Mr. Frost kept the surveillance secret. The trial court denied Mr. Frost the opportunity to cross-examine Mr. Douglas as to Frost's and Mr. Douglas' ever being at odds, in order to establish lack of motive. The trial court denied Mr. Frost's proffer of his oath of office and further restricted his proffer of evidence and argument as to state statutes that require him to follow orders of his superior. Cross-examination of Douglas as to any of his history was limited. The trial court would not allow the defense to present expert testimony as to the legality of the surveillance.

The trial court justified these limitations placed on the defense by its considering the surveillance to be legal and not in

issue, with the fruit of the surveillance to be the issue. However, considering the manner in which the government presented the case, the limitations placed upon the defense by the trial court, and the above charge given in response to the jurors' question, there was confusion as to the question of whether the indictment was making the surveillance itself an issue, without regard to what was done with the fruit of the surveillance. There was a need for the court to clear these questions through adequate instruction.

Outside the presence of the jury, both in chambers and in open court, prior to closing arguments, the trial judge informed counsel that he was going to tell the jury the surveillance was legitimately done and that the surveillance, including making the tape, was legal. (50a-51a, 53a-55a, 56a).

Although the trial judge on his own motion an initiative promised to charge the jury as is indicated above, he never gave such a charge. The closest the trial court ever came to giving such a charge was as follows:

> Under Georgia law, police officers have the right to investigate anyone who is suspected of engaging in criminal behavior. Police officers, however, do not have the right to use the results of such an investigation for an illegal purpose.

(74a).

The government contributed to the harm and prejudice resulting from this failure on the court's part to charge the jury as the court had promised. The government suggested that it was the defense who had made an issue as to the legality of the investigation and the government's attack in that regard was only

directed at the credihility of the defendant's witnesses. (57a). A substantial portion of the government's opening argument was devoted to a discussion of the surveillance, including the taping. (58a-63a). The government continued in rebuttal argument to discredit the surveillance. Reference was made to the stalking and photographing of Douglas. (63a-65a). The legitimacy of the investigation was contended by the government to be an issue. (64a-65a). The prosecutor argued that the investigation was not legitimate and it included stalking Douglas and specifically:

> Nothing about that investigation was legitimate from start to finish.

(65a). The petitioners' argument relied heavily upon counsels' belief that the trial court was going to charge the jury that the surveillance of Douglas including the taping was legal. (35a-36a).

Petitioners' counsel were placed in an untenable position with no hope to survive the prosecution considering that: (1) the government had agreed outside the presence of the jury that the surveillance was legal; (2) the trial judge had promised to instruct the jury that the surveillance was legal; (3) defense counsel in argument to the jury then made reference to the expected charge that the surveillance was legal; (4) the prosecutor then argued that the surveillance was not legal but was wrong from start to finish; and (5) the trial judge then failed to give the charge he had promised to give. Consequently it was clearly an error that deserved some consideration by the Court of Appeals since the trial court failed to grant petitioner's timely motion for a mistrial in the District Court or to give curative instructions. (70a).

The decision not to reverse the conviction for these reasons

is clearly contrary to the established right within the federal system to a fair pre-argument charge conference. The purpose of the requirement that counsel e informed of the court's proposed action on charges is that counsel, fairly advised, may argue intelligently. *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978);*United States v. Gaskins*, 849 F.2d 454 (9th Cir. 1988); and *United States v. Oliver*, 766 F.2d 252 (6th Cir. 1985).

IV.

THE COURT OF APPEALS FAILED TO APPLY THE LAW IN EFFECT AT THE TIME OF ITS DECISION REGARDING MR. JOHNSON'S PERJURY CONVICTION.

Subsequent to oral argument in the Court of Appeals, this Court rendered its decision in *United States v. Gaudin*, 515 U.S. __, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (June 19, 1995). Prior to that decision, the federal courts of appeals and this Court had uniformly held that the materiality of alleged perjured testimony was a question of law for the trial court alone and not a question for the jury. *See* 22 A.L.R. Fed. 37, § 4; 18 U.S.C. § 1621, Note 157; 18 U.S.C. § 1623, Note 129. The predecessor to the court below had even ruled that evidence of materiality ". . . should be received outside the presence of the jury." *United States v. Damato*, 554 F.2d 1371, 1373 (5th Cir. 1977).

In *Gaudin* this Court held that, when materiality is an element of the offense, it is error of constitutional magnitude to remove the issue of materiality from the jury's consideration. That is precisely what was done in this case. *See* 75a. No objection was made at the trial because the law was so well settled, and, for the same reason, this precise issue was not addressed in our brief to the court below. However, we did assert that the government had faile to prove materiality at the trial (Johnson's opening brief below, pp. 18-20). We believe that

assertion was well founded. However, even if that was incorrect, it is undisputed that no evidence of materiality was placed before the jury, nor was the jury allowed to consider whether materiality had been proved, as is required by *Gaudin*. (75a). Therefore, the issue of proof of materiality was fully preserved for review.

A reviewing court must apply the law in effect at the time of its decision unless a manifest injustice would result. *Bradley v. School Board of City of Richmond*, 416 U.S. 37, 387, 94 S. Ct. 2006, 2016, *et seq.*, 40 L. Ed. 2d 476 (1974). The panel of the court below was either unaware of *Gaudin* or did not realize its applicability to the present case. *Gaudin* clearly stands for the proposition that proof of materiality must be put before the jury. That was not done in this case and, for that reason, the perjury conviction of Mr. Johnson may not stand. *See also Singleton v. Wulff*, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877, 49 L. Ed. 2d 826 (1976). We pointed this out in our Suggestion of Rehearing, but the court below ignored our request.

CONCLUSION

1. The Court of Appeals refused to address our contention that the object of the extortion in this case was not a "thing of value" as a matter of law, and allowed convictions to stand which were based upon a legal principle contrary to that court's own decision in *Warren v. Crawford, supra*, which, in turn, was based upon this court's decision in *Board of Regents of State Colleges v. Roth, supra*. This action by the Eleventh Circuit, like its similar action in *United States v. Nilsen. supra*, has serious due process and free speech implications. Moreover, the construction of the phrase a "thing of value" which was allowed in the presrnt case is contrary to the construction of the same phrase followed by the Courts of Appeals of the Fourth, Ninth, and Second Circuits in the cases of, respectively, *United States v. Matzkin, supra; United States v. Tobias, supra;* and *United States v. Girard, supra.*

2. Threatening exposure of wrongdoing by a public official unless he or she resigns is not the type of "wrongful" threat required for an illegal extortion. Such a construction of an extortion statute would be violative of the First Amendment to the United States Constitution.

3. No Court of Appeals should allow a trial judge to misrepresent to counsel the nature of his jury instructions, especially when counsel rely on that representation in their summations. In the present case this error was compounded by the fact that the government also misrepresented its position on the same subject matter (the legality of the surveillance), and argued the case to the jury during rebuttal argument in a fashion contrary to its prior representation. This error was further compounded by the government's characterization of the petitioners as being similar to Nazis, third world dictators, and war criminals. These remarks were clearly not responsive to petitioners' arguments and were not supported by the evidence. The allusions to Nazis and war criminals had absolutely no place in a trial for a non-violent, non-forcible alleged extortion. However, to pour more fuel on this already improper fire, the prosecutor made the statement that the petitioners would have done the same thing to other persons that they did to Councilman Douglas. This statement was totally bereft of evidentiary support. None of these arguments brought curative action by the trial judge.

4. The Court of Appeals failed to apply the law in effect at the time of its decision, thereby violating the holding of this court in *Bradley v. School Board of City of Richmond, supra.* Had the court below applied the appropriate standard, Mr. Johnson's perjury conviction would have been reversed.

The Court of Appeals' decision that the combined impact of these errors was harmless is not supported by the record.

Moreover, it flies in the face of prior decisions by this court and other federal courts of appeals in analogous circumstances.

For all of these reasons, our request for a writ of certiorari should be granted and, ultimately, the decision of the Court of Appeals in this case reversed.

Respectfully submitted,

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APPENDIX A— ORDER OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 6, 1996

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 93-9382-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY FROST, Major, GEORGE JOHNSON,

Defendants-Appellants.

No. 94-8385-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY FROST, Major

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

Appendix A

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ John W. Hatchett
JOHN W. HATCHETT
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX B— ORDER OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 6, 1996

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 93-9382-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY FROST, Major, GEORGE JOHNSON, EDWARD WAYNE MARTIN,

Defendants-Appellants.

No. 94-8385-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY FROST, Major

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

Appendix B

BEFORE: HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

The Petition(s) for rehearing filed by Appellants Frost and Johnson are denied.

ENTERED FOR THE COURT:

s/ John W. Hatchett
JOHN W. HATCHETT
UNITED STATES CIRCUIT JUDGE

ORD-41

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX C— OPINION OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MARCH 19, 1996

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gary FROST, Major, George Johnson, Edward Wayne Martin, Defendants-Appellants.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gary FROST, Major,

Defendant-Appellant.

Nos. 93-9382, 94-8385.

United States Ccourt of Appeals,
for the Eleventh Circuit

March 19, 1996.

* * *

Appeal from the United States District Court for the Middle District of Georgia.

Appendix C

Before HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and YOUNG* Senior District Judge.

PER CURIAM:

Our earlier opinion, reported at 61 F.3d 1518, is hereby modified by withdrawing that portion thereof designated as section B. 1. of part II., beginning on page 1523, and substituting the following:

B. EVIDENTIARY CHALLENGES.

1. *Jurisdiction.*

Appellants Frost and Johnson also argue that the evidence was insufficient to support the Hobbs Act jurisdictional allegations contained in the indictment. The government was required to prove two essential elements to support the Hobbs Act offense alleged in Count 1— "interference with [interstate] commerce, and extortion." *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 274, 4 L.Ed.2d 252, 257 (1960). Proof of a connection to interstate commerce is a jurisdictional prerequisite to a Hobbs Act conviction. *United States v. Alexander*, 850 F.2d 1500, 1503 (11th Cir. 1988), *cert. denied*, 489 U.S. 1068, 109 S.Ct. 1346, 103 L.Ed.2d 814 (1989), and *vacated on other*

* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

grounds, 492 U.S. 915, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989); *United States v. De Parias*, 805 F.2d 1447, 1450 (11th Cir. 1986), *cert. denied*, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 678 (1987). Although the indictment sufficiently alleged an interstate commerce nexus, we agree that the government's proof fell short of its intended purpose.

There was some mention made that the affairs of the city council were linked to interstate commerce. William Douglas, the target of the blackmail, testified that the council employed a Jacksonville, Florida engineering firm to perform consulting work and that the city sometimes purchased items that moved in interstate commerce. There was no showing, however, that the resignation of one member of the six-member city council would have impacted the continuing business of that governing body in such a manner as to constitute a violation of the federal statute. Therefore, we cannot say, on the record before us, that the extortionate threat, if it had succeeded, "was likely to have the natural effect of obstructing commerce." *United States v. Farrell*, 877 F.2d 870, 875 (11th Cir.), *cert. denied*, 493 U.S. 922, 110 S.Ct. 289, 107 L.Ed.2d 268 (1989). Consequently, we must reverse Appellants' convictions on Count 1 of the indictment, including that of Martin. Although Martin did not assert this issue on

> appeal, a Hobbs Act conviction may not stand absent proof of interference with interstate commerce, "since the Federal Government's jurisdiction of this crime rests only on that interference." *Stirone*, 361 U.S. at 218, 80 S.Ct. at 274, 4 L.Ed.2d at 257.
>
> In light of the failure of the government's proof in this respect, we find it unnecessary to address whether *United States v. Lopez*, __ U.S. __ ,115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond Congress' Commerce Clause authority), which was decided after oral argument was heard in this case, altered the measure of evidence necessary to support the interstate commerce element of a Hobbs Act prosecution. This is so because, even under pre-Lopez law, the evidence of an interstate commerce nexus was not enough.

With this change we also amend part III of the opinion on page 1529 to delete the second sentence and substitute in its place:

> For the reasons expressed, we VACATE Appellants' convictions and sentences on Count 1 of the indictment, we AFFIRM the remaining convictions of Appellants Frost and Johnson and we AFFIRM the denial of Appellant Frost's Motion for Except for New

Appendix C

Trial; We REVERSE the remaining sentences of Appellants Frost, Johnson and Martin and REMAND to the district court for resentencing proceedings consistent with this opinion.

Except for these modifications, the remainder of the opinion is unchanged.

APPENDIX D— OPINION OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AUGUST 25, 1995

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gary FROST, Major, George Johnson, Edward Wayne Martin,

Defendants-Appellants.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Gary FROST, Major,

Defendant-Appellant.

United States Court of Appeals,
for the Eleventh Circuit

Nos. 93-9382, 94-8385.

August 25, 1995.

* * *

Appeals from the United States District Court for the Middle District of Georgia.

Appendix D

Before HATCHETT, Circuit Judge, HENDERSON, Senior Circuit Judge, and YOUNG*, Senior District Judge.

PER CURIAM:

In the first of these two related appeals, Defendants-Appellants Gary Frost and George Johnson appeal from their convictions and sentences; Defendant-Appellant Edward Wayne Martin appeals his sentence. In the second case, Defendant-Appellant Frost appeals from the district court's denial of his Motion for New Trial based on newly discovered evidence.

I. FACTS

The three Appellants were accused of conspiring to mail a videotape and a note to William Douglas, a member of the Warner Robins City Council, for the purpose of causing Douglas to resign from the City Council.[1] All three Appellants were charged with Attempt to obstruct, delay and affect commerce in violation of 18 U.S.C. section 1951 (the Hobbs Act), conspiracy to commit an offense against the United States in violation of 18 U.S.C. 371 by mailing a threatening communication in violation of 18 U.S.C. section 876, and mailing a threatening communication in violation of 18 U.S.C. section 876. Johnson and Martin were also charged with making false statements before a federal grand jury in violation of 18 U.S.C. section 1623. The jury returned a verdict of guilty on all counts as to these Appellants.

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* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

1. The videotape showed Douglas, a married man, in a car with a woman who was not his wife. Douglas was meeting with the woman on federal property when, unbeknownst to Douglas, the tape was made.

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The evidence at trial showed the following. Appellant Martin was elected Mayor of the town of Warner Robins, Georgia, in 1988. At the time of Martin's election, Douglas was a City Council member and had so served for twelve years; Appellant Johnson was the Police Chief of Warner Robins; and Appellant Frost was a police department Major in charge of the patrol and criminal investigative divisions. As Mayor, Martin supervised Johnson; as Police Chief, Johnson supervised Frost.

After taking office as Mayor, disputes arose between Martin and city council members as to the manner in which Warner Robins should be run.[2] Douglas drafted — and the council passed — several ordinances which reduced the Mayor's spending authority. On April 22, 1991, four months after Douglas had sponsored the ordinances, he received a package through the mail which contained a videotape and an anonymous handwritten note which stated that the videotape would be given to the Mayor and Douglas' wife unless Douglas resigned immediately from the city council. Douglas did not resign from the council, nor did he mention the tape and note to anyone.

Mark Street, an employee of the City of Warner Robins, testified that he had picked up the city mail on April 22, 1991, and delivered it to City Hall; while it was not Street's normal duty to deliver the mail, he did so because the employee who normally had mail duty was absent from work that day. Later that day, Street testified, he was called by Frost, who asked whether Douglas had received a package in the mail. When Street responded affirmatively, Frost asked Street to come to the Police

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2. In addition, there was testimony that "rumors" were being circulated to the effect that Douglas was considering running for the office of mayor in the next election.

Department and tell him what had happened. When Street met with Frost and related to him Douglas' reaction to the package, Street testified, Frost made a statement to the effect that Frost "bet [Douglas] was upset." Appellant Johnson was present during this conversation.

On May 1, 1991, Martin called Douglas and requested that Douglas come to his office. Upon Douglas' arrival, Martin told Douglas that he had received a videotape in the mail depicting Douglas "in a compromising situation." A city council meeting was held that evening, during which Douglas informed the other members of the council of the videotape and note he had received. The council rejected Douglas's offer to resign.

At the next city council meeting, Martin pulled Douglas aside and asked him if he had received any further communication concerning the videotape. Douglas recalled that, when he advised Martin that he had not received any further communication, Martin responded: "I'm not suggesting that you do this, but if you resign, maybe they won't send a copy to your wife."

Appellants Frost and Johnson did not dispute that the videotape had in fact been made on April 16, 1991, at the direction of Johnson and with Frost's participation, using a video camera owned by the Warner Robins Police Department. Testimony at trial established that Johnson had two copies of the videotape made on the same day the videotape was filmed; later that day, Frost and Johnson assembled in Martin's office to view one copy of the tape, which was left with Martin after the viewing.

Expert testimony showed that the copy of the tape sent to

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Douglas was a "first generation" copy, *i.e.*, one made directly from an original tape. The evidence reflected that, as of April 19, 1991, the day the tape was mailed to Douglas, three such copies of the tape existed. The original tape was in the possession of Johnson; the three copies consisted of a copy that Johnson had and which he later gave to his former secretary; a copy given to Wiley Bowman, the Director of Public Works for Warner Robins, who had participated in the surveillance of Douglas; and a copy given to Martin on April 16, 1991.

The evidence revealed that the only one of the three videotapes unaccounted for after April 19, 1991, and, therefore, the only one which could have been sent to Douglas on that date, was the tape which had been in the possession of Martin. In addition, a finger-print on the back side of the anonymous note was identified as Martin's.

Daniel Hart testified that, in early 1992, while he was a Warner Robins police officer, Hart asked Johnson whether Johnson believed a rumor that Douglas was planning to run for Mayor in the impending election. Hart testified that Johnson responded that Douglas would not be running for the office of Mayor because "[w]e have a tape, a videotape of Douglas and his girlfriend in a car . . . ." Hart also testified that Johnson started during the same conversation that Douglas "had been told to resign his council seat," and would not run for that position again.

The evidence further revealed that, during the investigation, Martin advised Wiley Bowman to destroy Bowman's copy of the tape and that Martin had destroyed a copy that he obtained subsequent to the mailing of the videotape to Douglas. During the ensuing investigation, Martin and Johnson appeared before

the federal grand jury. Martin and Johnson were charged with the convicted of making false statements under oath when questioned concerning the matter under Counts 4 and 5, respectively.

After the convictions, the United States Probation Department prepared presentencing investigation reports which were presented to all three Appellants. In calculating the applicable guidelines, the Probation Department used the guidelines manual effective November 1, 1993, since the Appellants were to be sentenced after that date. The Probation Department used section 2B3.3 of the United States Sentencing Guidelines to determine the base offense level. Additionally, the Probation Department factored in for each Appellants a two-point upward adjustment under guidelines section 3B1.3 for abuse of a position of trust. All Appellants objected to the use of the 1993 guidelines manual and argued that the 1991 manual should be used since the crime occurred during that year. Several hours prior to the hearing, the court notified all counsel that the court considered 2B3.2, rather than 2B3.3, as the proper guideline for computing the base offense level.

After hearing all the arguments of counsel, the court agreed to apply the guidelines contained in the 1991 manual; however, over the objection of the Appellants, the court used 2B3.2 as the guideline for computing the base offense level, rather than 2B3.3, which was the section utilized by the Probation Department in its presentence reports. The district court enhanced each Appellant's offense level two points for abuse of a position of trust, sentencing Appellants Martin and Johnson to 51 months and Appellant Frost to 33 months in the custody of the Bureau of Prisons.[3]

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3. On Count 1, Martin and Johnson each were sentenced to 51 months' imprisonment followed by three years of supervised release; on Count 2, 51

(Cont'd)

Appendix D

II. DISCUSSION

As noted above, each Appellant appeals his sentence.[4] Appellants Frost and Johnson also raise numerous issues relating to their convictions. We find that the evidence was sufficient to support the verdicts against Appellants Frost and Johnson; we discuss certain of the issues raised concerning their convictions below.[5]

(Cont'd)

months' imprisonment to be served concurrently with the sentence in Count 1, followed by three years of supervised release; and on Count 3, 24 months' imprisonment to be served concurrently with the sentences on Counts 1 and 2, and on their respective perjury counts, followed by three years of supervised release. On Count 4, which charged Martin with perjury, he was sentenced to 51 months' imprisonment to be served concurrently with the sentences in Counts 1 and 2, followed by three years of supervised release; Johnson received the same sentence on Count 5, in which Johnson was charged with perjury.

On Count 1, Frost was sentenced to 33 months' imprisonment followed by three years of supervised release; on Count 2, 33 months' imprisonment to be served concurrently with the sentence in Count 1, followed by three years of supervised release; on Count 3, 24 months' imprisonment to be served concurrently with the sentence in Counts 1 and 2, followed by 3 years of supervised release.

4. As noted, Appellant Martin appeals only his sentence.

5. After a thorough review of the record, we further find that: the district court did not abuse its discretion in refusing to disclose grand jury proceedings prior to the disclosure of material under the Jencks Act; the district court did not err in excluding written evidence of Frost's oath as a police officer; and the district court did not abuse its discretion by excluding the testimony of certain witnesses. These issues require no further discussion.

Appendix D

A. REFUSAL TO DISMISS THE INDICTMENT.

We address the allegations of insufficiency of the indictment only with respect to the interstate nexus/Hobbs Act issue. The other arguments as to the sufficiency of the indictment are without merit and do not warrant further discussion.

Appellants allege as reversible error the fact that the district court did not dismiss the indictment prior to trial on the basis that it fails to contain any allegation that the City of Warner Robins was engaged in interstate commerce. An indictment is sufficient if it contains the elements of offense charged in a manner which fairly informs the defendant of the charges against which he must defend and enables the defendant to enter a plea which will bar future prosecution for the same offense. *United States v. Elkins*, 855 F.2d 775 (11th Cir. 1989), *cert. denied*, 494 U.S. 1005, 110 S.Ct. 1300, 108 L.Ed.2d 477 (1990). Our review of the indictment in this case leads to our conclusion that the indictment adequately charged the defendants, and the district court did not err in denying the motion to dismiss it.

B. EVIDENTIARY CHALLENGES.

1. *Jursidiction*

Appellants argue that the evidence was insufficient to support the Hobbs Act jurisdictional allegations contained in the indictment. Appellants were charged with an attempt to obstruct or affect commerce by extortion. "The Hobbs Act applies to extortion wherein the perpetrator '. . . *in any way or degree* obstructs, delays or affects commerce or the movement of any article or commodity in commerce . . .' " *United States v. Farrell*, 877 F.2d 870, 875 (11th Cir. 1989), *cert. denied*, 493

U.S. 922, 110 S. Ct. 289, 107 L.Ed.2d 268 (1989) (quoting 18 U.S.C. section 1951(a)). Cases construing the Hobbs Act have repeatedly held that the statute's plain terms forbid interference with interstate commerce in *any* degree. *United States v. Summers*, 598 F.2d 450 (5th Cir. 1979). "Only a *de minimis* nexus with interstate commerce is required." *Farrell*, 877 F.2d at 875 (citing *United States v. Jackson*, 748 F.2d 1535 (11th Cir. 1984)).

> Where attempted extortion or conspiracy to extort are charged, the interstate nexus may be demonstrated by evidence of potential impact on interstate commerce or by evidence of actual, *de minimis* impact. *Id.* Potential impact is measured at the time of the attempt, *i.e.*, when the extortion demand is made, based on the assumed success of the intended scheme. *Id.* A sufficient potential impact exists when there is evidence of "a plan to embark upon a course of extortionate behavior likely to have the natural effect of obstructing commerce."

Id. (citations omitted).

Had the charged extortion scheme succeeded, the likely natural effect was that interstate commerce would have been affected. The evidence was sufficient to show that the goal of the extortion was to have William Douglas resign his Warner Robins City Council seat, and that the actions of that city council, at least to a minimal degree, affect interstate commerce. The question then becomes whether Douglas' resignation would have had a potential impact on the operation of the city. We conclude that the potential impact of Douglas' resignation as a city council

member was sufficient to provide the necessary jurisdictional element under the Hobbs Act. Accordingly, we hold that the jurisdiction of the trial court was valid.

2. *Expert testimony.*

Appellant Johnson asserts that the district court abused its discretion in excluding as not relevant the proffered expert testimony of a Georgia attorney who would have testified as to his opinion that the videotape was insufficient evidence to warrant prosecution of Douglas under Georgia law. Appellant Johnson asserts that this testimony would have bolstered his testimony as well as the testimony of Appellant Frost that they conducted surveillance of and videotaped Douglas as part of a legitimate criminal investigation being conducted by the Warner Robins Police Department.

The district court "has broad discretion to exclude expert testimony, and his action will be upheld unless it is manifestly erroneous." *Hibiscus Associates Ltd. v. Bd. of Trustees of Policemen and Fireman Retirement System,* 50 F.3d 908, 917 (11th Cir. 1995). There was no contention by the prosecution in this case that the police did not have a right to investigate criminal conduct; further, the jury was properly instructed that "police officers have the right to investigate anyone who is suspected of engaging in criminal behavior." Because no issue was raised as to whether Douglas' behavior was prosecutable, we find that the district court did not abuse its discretion in prohibiting the admission of this proffered expert testimony.

3. *Limiting cross-examination of witnesses.*

Appellants Johnson and Frost both assert that the district court erred by not allowing their respective defense counsel

greater latitude in cross-examination and impeachment of government witnesses. Frost contends that the limitations placed upon his counsel's cross-examination of Mark Street about possible bias was an abuse of the district court's discretion; Johnson makes the same claim with respect to the cross-examination of Daniel Hart. Frost also asserts that the district court abused its discretion when it excluded as not relevant the cross-examination of William Douglas about prior misconduct with women and about the employment of his companion in the videotape. In addition, Frost maintains the district court denied him the right to impeach witness Street for bias by disallowing as not relevant during cross-examination one question of witness Sherry Schmitz concerning whether or not Mark Street had told her someone was blaming him for the blackmail incident.

The district court's discretion in limiting the scope of cross-examination is subject to the requirements of the Sixth Amendment, *United States v. Diaz*, 26 F.3d 1533, 11539 (11th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 1110, 130 L.Ed.2d 1075 (1995). "The Confrontation Clause guarantees criminal defendants an opportunity to impeach through cross-examination the testimony of witnesses for the prosecution." *United States v. Baptista-Rodriquez*, 117 F.3d 1354, 1370 (11th Cir. 1994). The defendant's right to cross-examination, however, is not without limitation; he is entitled only to an opportunity for effective cross-examination, not cross-examination that is effective "in whatever way, and to whatever extent, the defense might wish." *Id.* at 1366 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987)). "A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he can properly

argue why the witness is less than reliable." *Id.* at 1371. Once there is sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the district court's discretion. *Diaz*, 26 F.3d at 1539. The trial judge has wide latitude to impose reasonable limitations on cross-examination based upon concerns such as relevancy, and those restrictions are reviewed solely for abuse of discretion. *Baptista-Rodriquez*, 17 F.3d at 1370-71.

A review of the record reflects that all prosecution witnesses were thoroughly and effectively cross-examined by all defense counsel. Appellants have not shown that the restrictions placed on defense counsel were an abuse of the district court's discretion.

4. *Improper prosecutorial remarks.*

Both Appellants Frost and Johnson contend that the district court abused its discretion in denying the motion for mistrial made after the government's attorney made the following comment to the jury during closing argument:

> What they did to William Douglas and what they would have done to others is no different than what the Gestapo did in World War II. It is no different than what authorities in Third World countries do to the people under their protection.

We review the record in its entirety to determine if the statements were improper and, if so, whether they rendered the trial fundamentally unfair. A prosecutor's argument renders a trial unfair if "there is a reasonable probability that [the remarks]

changed [the] outcome of the case." *Baxter v. Thomas*, 45 F.3d 1501, 1508 n. 15 (11th Cir. 1995) (quoting *Brooks v. Kemp*, 762 F.2d 1383, 1402 (11th Cir. 1985) (en banc), *vacated*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated on remand*, 809 F.2d 700 (11th Cir.) (en banc) (per curiam), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987)).

Although we think the prosecutor was ill-advised to make a reference to Nazi Germany during her closing argument, we are convinced, upon a review of that particular comment in context and the entire record, that Appellants have not shown that any of the prosecutor's remarks rendered their trial fundamentally unfair.

C. FROSTS MOTION FOR SEVERANCE.

Appellant Frost appeals the district court's denial of his motion for severance, which was made both prior to and during his trial. We may reverse a district court's denial of a motion for severance only if we find that the court abused its discretion. *United States v. Adams*, 1 F.3d 1566 (11th Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994).

Appellant Frost argues that this case presented mutually exclusive defenses. Specifically, Frost asserts, handwriting exemplars introduced into evidence by co-defendant Martin in which Frost had misspelled the word "councilman", the same as it had been spelled by the writer of the blackmail note, was highly prejudicial and damaging to Frost. We address the nature of this evidence in section F, the portion of this opinion discussing Frost's motion for a new trial.

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Joinder of defendants is proper "if they are alleged to have participated in the same . . . series of acts or transactions constituting an offense or offenses." F.R. Crim. P. 8(b). The defendant attempting to establish that the district court abused its discretion in denying a motion for severance carries a heavy burden. This Court has held:

> In conspiracy cases like this one, the general principle is well-settled that "persons who are charged together should also be tried together." In evaluating a motion for severance, this court must determine whether the prejudice inherent in a joint trial outweighs the interests in judicial economy. To establish that the district court's balancing of interests was an abuse of discretion, [the defendant] must "demonstrate that a joint trial resulted in specific and compelling prejudice to the conduct of his defense."

Adams, 1 F.3d at 1578 (quoting *United States v. Saget*, 991 F.2d 702, 707 (11th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 396, 126 L.Ed.2d 344 (1993)). By proving that the defenses in the case were "antagonistic to be point of being irreconcilable and mutually exclusive," a defendant can meet this burden. *United States v. Farrell*, 877 F.2d 870, 876 (11th Cir.), *cert. denied*, 493 U.S. 922, 110 S.Ct. 289, 107 L.Ed.2d (1989) (quoting *United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984)). "The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *Id.*

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As noted, we have discussed in section F of this opinion the exemplars that Frost asserts prejudiced his defense, and we find that the defenses offered at trial by Frost and Martin were not mutually exclusive and antagonistic. Accordingly, we conclude that the district court did not abuse its discretion in refusing to sever.

D. JURY INSTRUCTIONS

With respect to Appellants' contentions regarding the jury instructions in this case, we note that the trial court has broad discretion in formulating a jury charge. *Christopher v. Cutter Laboratories*, 53 F.3d 1184 (11th Cir. 1995). We have reviewed the instructions as a whole and determined that the instructions fairly and adequately addressed the issues and correctly stated the law. The jury was properly instructed that "police officers have the right to investigate anyone who is suspected of engaging in criminal behavior," and that "[p]olice officers . . . do not have the right to use the results of such an investigation for illegal purpose."

E. THE ALLEN CHARGE

This Circuit allows the use of *Allen* [*Allen v. U.S.*, 162 U.S. 492, 17 S. Ct. 154, 41 L.Ed. 528 (1896)] charges. *United States v. Elkins*, 885 F.2d 775 (11th Cir. 1989), *cert. denied*, 494 U.S. 1005, 110 S. Ct. 1300, 108 L.Ed.2d 477 (1990). This Court's inquiry on appeal of a district court's decision to give an *Allen* charge is limited to evaluating the coercive impact of the charge; thus, the question we address is whether, under the totality of the circumstances and language of the charge, the jury was unduly coerced into reaching a verdict. *Id.*; *United States v. Chigbo*, 38 F.3d 543 (11th Cir. 1994).

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The language the district court used in this case did not deviate from the wording used in accepted *Allen* charges, and the totality of the circumstances do not indicate coercion. We conclude that the district court's *Allen* charge did not unduly coerce the jury into reaching a verdict.

F. FROST'S MOTION FOR NEW TRIAL

After filing the appeal of his conviction and sentence, Appellant Frost filed with the district court a motion for new trial based on newly discovered evidence. Frost cited three grounds for his motion: (1) impeachment evidence of government witness Mark Street; (2) evidence that a fourth person wrote the extortion note; and (3) perjury of co-defendant Martin in denying that he knew the identity of the author of the threatening note.

In its order, the district court noted that Frost's appeal removed the district court's general jurisdiction under Federal Rules of Criminal Procedure 33, and that it could not grant a motion for new trial absent a remand from this Court. The Court then proceeded to consider and deny the motion on its merits. The district court did not hold a hearing on the motion. Frost filed a second appeal, contending that the district court erred in denying his motion for a new trial.

While Rule 33 expressly prohibits the granting of a motion for new trial absent a remand from the appellate court, the district court acted within its jurisdictional power in denying the motion. *United States v. Hersh*, 415 F.2d 835 (5th Cir. 1969).[6]

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6. This Court has adopted as binding precedent decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

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A motion for a new trial is committed to the sound discretion of the trial court and will not be overruled on appeal absent an abuse of discretion. *United States v. Garcia*, 13 F.3d 1464 (11th Cir.), *cert. denied*, __U.S.__, 114 S. Ct. 2723, 129 L.Ed.2d 847 (1994).

In order to justify the granting of a new trial based on newly discovered evidence in a criminal trial, the defendant must satisfy a five-past test: (1) the evidence must have been discovered subsequent to the trial; (2) the movant must have exercised due diligence in discovering the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to the issues before the court; and (5) the evidence must be such that it would probably produce a new result. *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989). Moreover, the district court cannot grant a motion for a new trial based on newly discovered evidence once it has determined that the movant has failed to satisfy any part of the test. *United States v. Reed*, 887 F.2d 1398, 1404 (11th Cir. 1989), *cert. denied*, 493 U.S. 1080, 110 S. Ct. 1136, 107 L.Ed.2d 1041 (1990).

In his motion for a new trial, Frost cited as newly discovered evidence certain employment records of the employee who normally delivered the mail to the Warner Robins City Hall, Victor Irwin. While these records, which were attached by Frost to his motion, show that Irwin did not clock into work at all on April 22, 1991, the day on which the evidence established that Street delivered the package containing the videotape and extortion note, the records also show that he was not charged any leave for that day. Frost argues that these records were sufficient to have caused the jury to acquit Frost.

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Assuming without deciding that this evidence was not available to Frost and was in fact newly discovered, Frost fails to satisfy the five-pronged test. Frost's apparent argument is that the records show that Street did not pick up and deliver the mail on April 22, 1991, as he testified and, therefore, Street was not truthful in his testimony. As the district court noted, no evidence has been proffered to show that Street did not deliver the mail that day. In his own testimony, Frost stated that Street has related to him on April 22, 1991, that Street had delivered the mail because the employee who usually did so was absent. Additionally, two other witnesses called by Frost at trial testified that Street had related that he had delivered the mail on April 22, 1991. The evidence asserted by Frost as newly discovered does not contradict Street's testimony that he delivered the mail on the day in question. Even assuming that the evidence proffered by Frost in support of his motion could be viewed as impeaching, this evidence concerning the possibility that Irwin was not charged with leave even though he had not clocked into work on that day is not material and would not have been likely to have resulted in Frost's acquittal.

Appellant Frost asserts a second ground in support of his motion for a new trial. Subsequent to the trial of this case, Frost's attorneys established that Curtis McCollum, a Warner Robins minister, had written the blackmail note involved in this case. McCollum entered a guilty plea to the offense of misprision of a felony and stated under oath that he had written the note at the urging of Appellant Martin. Appellant Frost asserts that, at trial, significant emphasis was placed on the fact that in the blackmail note, the word "council" had been misspelled as "counsel" and that the evidence established that Frost was the only person of the all those whose handwriting exemplars had been taken who had misspelled that word. Because it was later conclusively

established that McCollum had written the note, Frost argues, he is entitled to a new trial.

We agree with the district court that the evidence that McCollum wrote the note does not entitle Frost to a new trial. There was no evidence presented or argument made by the government connecting Frost to the actual writing of the note. The government's handwriting expert stated that he could not render an opinion as to who had written the note, and Frost's own handwriting expert testified that Frost had not written the note. The exemplars were offered by Martin's attorney and admitted without objection by Frost; no mention of Frost's misspelling of the word "council" was made to the jury. We find that this evidence was not material to Frost's guilt, and was not likely to result in Frost's acquittal.

Frost's final argument in support of his motion was that he was prejudiced by and entitled to a new trial because of the perjury of co-defendant Martin. Frost asserts that, if Martin had testified truthfully that he had caused the note to be written and mailed, Frost would have been acquitted.

As the district court noted in its order denying Frost's motion, Frost presumes in making both his second and third arguments for a new trial that he "was convicted based solely on an assumption that he wrote the extortion note." The government neither attempted or needed to prove authorship of the note to carry its burden of proof; in fact, the government introduced evidence that it was impossible to tell who wrote the note. The testimony of Mark Street was sufficient evidence from which the jury could conclude beyond a reasonable doubt that Frost knowingly participated in the scheme to obtain damaging evidence on Douglas and use it in an extortionate manner,

regardless of the fact that Martin may have acted alone in causing the note to be written and mailed. Accordingly, we find that this evidence was not material and would not have resulted in an acquittal of Frost.

For the reasons discussed, we find that the district court did not abuse its discretion in denying Frost's motion for a new trial.[7]

G. SENTENCING.

Appellants also challenge their sentences on two grounds. In sentencing guidelines cases, we review the district court's findings of fact for clear error and its application of the law to those facts *de novo United States v. Williams*, 51 F.3d 1004 (11th Cir. 1995).

(1) In the first of these challenges, Appellants maintain that the district court erred in utilizing section 2B3.2 of the United States Sentencing Guidelines ("Extortion by Force or Threat of Injury or Serious Bodily Harm"), rather than section 2B3.3 ("Blackmail and Similar Forms of Extortion"), in establishing the base offense level for each Appellant's convictions.

For the following reasons, we agree with the Appellants that section 2B3.3, rather than 2B3.2, is applicable to establish the base offense level in this case.

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7. Frost and the government fully briefed the motion for new trial to the court, and the district court had available the entire record from the jury trial. The record of the trial fully supported the district court's findings as to each ground of the motion for new trial. Accordingly, we find that the district court did not abuse its discretion in denying the motion without a hearing.

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First, in Counts 2 and 3, Appellants were convicted under 18 U.S.C. 876 for mailing a written communication containing a "threat to injure the reputation of William Douglas." This conduct is contemplated by the fourth paragraph of section 876, which provides a maximum penalty of two years' incarceration for one who causes a communication to be delivered containing a threat "to injure the property or reputation of the addressee." This penalty is less severe — and therefore inconsistent with — the *minimum* penalty of 27 months' incarceration provided for under section 2B3.2 of the sentencing guidelines.

Second, we observe the Application Note 2 for section 2B3.2 provides as follows:

> This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.

The threatened conduct in this case was non-violent; no physical threat was made, and any economic threat flowing from the potential damage to the reputation of Douglas was not so severe as to threaten the existence of Douglas or the city council. On the

other hand, the Application Note to section 2B3.3 provides that 2B3.3 applies "to blackmail and similar forms of extortion where there is clearly no threat of violence to person or property." Because the instant case involved blackmail with no threat of violence, we find that section 2B3.3 is properly applied to the type of conduct involved herein.

(2). Appellants each challenge the district court's upward adjustment of their offense levels by two points for abuse of a position of trust. Sentencing guidelines section 3B1.3, entitled "Abuse of Position of Trust or Use of Special Skill," provides:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels.

Application Note 1 to section 3B1.3 provides:

> The position of trust must have contributed in some substantial way to facilitating the crime and not merely have provided an opportunity that could as easily have been afforded to other persons. This adjustment, for example, would not apply to embezzlement by an ordinary bank teller.

In this case, all three Appellants facilitated the commission of the crimes when they conspired with each other, using knowledge and resources available as a result of their positions as police officers and as Mayor, to commit and attempt to conceal the crimes of which they were convicted. The results of the

surveillance were used in an illegal manner in an attempt to gain political advantage and thereby influence the manner in which the City of Warner Robins was run. Clearly, this constituted an abuse of the public trust. Under these facts, we hold that the district court's imposition of the two-point enhancement was not clearly erroneous.

III. CONCLUSION

Any issues not addressed herein have been found to be without merit. For the reasons expressed, we AFFIRM the convictions of Appellants Frost and Johnson and AFFIRM the denial of Appellant Frost's Motion for New Trial; We REVERSE the sentences of Appellants Frost, Johnson and Martin and REMAND to the district court for resentencing consistent with this opinion.

APPENDIX E — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF PRETRIAL CONFERENCE DATED AUGUST 5, 1993

[Commencing at page 11]

when he or she files that notice. Mr. Williams and I have discussed it and we both, I thought, were of the opinion that it didn't apply in the case and then he filed the notice. The government was in a little bit of a quandry on whether or not he was relying upon that notice at all. I don't think it applies in this case. Whether or not that opinion has any weight is the Court's determination. I think we're looking at two separate situations here.

THE COURT: Why couldn't it apply in the case of his defendant?

MS. DUKE: Well, it's the making of the videotape and what was done with the videotape after it was made. I believe Mr. Williams, his response is my client was acting under superior — my client was acting according to his superior in making the videotape. Making the videotape wouldn't necessarily be a crime; it is what was done with the videotape after the making that's the problem.

THE COURT But if the evidence shows that his client had nothing to do with anything done with what he made, then obviously the defense does apply.

MS. DUKE: Then that would be different, but —

THE COURT: Then obviously, the defense does apply, public authority, that, 'All I did was act pursuant to public authority.'

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MS. DUKE: Yes, sir, but I don't think it necessary

* * *

APPENDIX F — EXCERPTS OF TRANSCRIPTS OF PROCEEDINGS DATED AUGUST 24, 1993 TO AUGUST 30, 1993

[Commencing at page 3]

longer than you have, they know him a lot better than these people do, and they're worried about him and concerned about him.

Now, this is about the last thing I'm saying about the overall project and then I'm really going to try to get into just talking about Frost. But what is any more stupid than to say that they did this to Douglas to get him off Council? If they really wanted Douglas off the Council, all they had to do was arrest the man. Now, the plain truth is, I think some of you asked why wasn't he arrested, and looking at it like a lawyer looks at things, you can justify arresting him or you can justify not arresting him. The plain truth is as vivid as you think you saw this film, it probably would not survive a directed verdict in a criminal case. But I'll tell you one thing, it would've certainly held up as a probable cause for him to be arrested.

THE COURT: Whoa. We're not here to argue this now.

MR. WILLIAMS: Gary Frost is accused of doing things and he's in a position of — you know, I spent a lot of time going into — and I guess my credibility or his credibility was being tested at the time, to establish that this surveillance was legal. I didn't realize until late Friday that the Court was considering that it was. I'm not quarreling with the Court about that, I think the Court had [4] to see it and hear it before the Court could say that. The Court has made a determination and we expect the Court's going to tell you that the surveillance was legal. That goes to a lot of what you just saw on that chart. The chart might've been made

a little earlier than the Court's ruling, but it's kind of like this; we had to spend a lot of time on the jurisdiction; the federal government owned the property, the City was buying the property, the Police Department had been policing it for years, but we spent a lot of time convincing the Court that the Police Department had a right to be there and the Court ultimately agreed. The way I understand it, if it's a legal surveillance, there's no problem with bringing Wiley Bowman and Billie Segars along. I frankly question the sensibility of that, but that surveillance was legal, and, you know, those things are done by police departments. I'm not saying that's the way to do it or not to do it. But it was a way that it was put upon Gary Frost to do it, you go out there with Willey Bowman and Billie Segars, you take pictures.

I spent a lot of time trying to establish that the order was legal, wanted to bring in the oath and that kind of thing. Well, the Court's now ruled that it's legal, so that's no longer a problem.

Gary Frost, everything he did and be mindful now, Frost's involvement in this starts around March, maybe a [5] little earlier than that, but seriously, more like March. He's told by the Chief to follow these people. You know, get — I think the Chief gave him the tag number, something like that, says, 'Find out where they go.' The next thing he knows Wiley Bowman's going with him, he's taking pictures. The Court has now ruled, the way I understand it, there's nothing wrong with that, that that was a proper procedure, so I'm not going to dwell on that a great deal longer. Now, I recognize and I think the Court's going to tell you that a legal act can be the basis for a conspiracy finding, if you — if the legal act is done in a way where the person intends it to be part of an overall conspiracy. The Judge will get that straight with you.

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Basically, at the point where the surveillance ends on the 16th, and the video is made, Frost is in his office and the Chief summons him to go to the City Hall, he goes, he leaves. The next thing his involvement amounts to is he, at the instruction of the Chief, and this is on the 22nd, after – well, let me say, after certainly the day the tape was mailed to Douglas, he logs out the video openly. Nothing secret. It's on the log. It's signed for by Major Frost, the video is taken and it's ultimately delivered to the Mayor. Nothing Frost did in that period of time was done in any kind of secretive or undercover way at all. The other officers knew it. There was a tripod set up out there. He logged out the

* * *

[8] you're having a break, I'm going to take up some things with the lawyers. We're going to give you a little longer break than the rest of us. Go to your juryroom, please. Everybody stay where you are while the jurors go out.

JURY OUT OF COURTROOM AT 3:00 P.M.

THE COURT: Let me see all counsel in Chambers.

IN CHAMBERS CONFERENCE:

THE COURT: I'll be glad to discuss anything y'all want to discuss, but first of all, since — is Douglas your first witness?

MS. DUKE: Yes, sir.

THE COURT: I think you all referred to his history. Now, frankly, I don't see that the history of Mr. Douglas and how long he had been doing anything is relevant to this case. Did y'all want to say why it is?

MR. ALMAND: Yes, sir, I would like to, Judge.

THE COURT: All right.

MR. ALMAND: Because I think the government's evidence, they're going to establish that it was — the original taping was done with the intent or purpose to create the extortion and there was no legitimate reason to do so, to make the initial tape.

THE COURT: No, I don't think there's any contention that there was no legitimate reason to make a tape. I haven't heard that yet.

[9] MR. ALMAND: Well, I hear it coming and I hear it in all the way the procedures were handled —

THE COURT: Well, let's assume there is no such contention. What is the relevance of how long Mr. Douglas and this woman have had an affair?

MR. ALMAND: The relevance of that, Your Honor, is the fact that at the time that Chief Johnson made that decision to do the investigation, he had in his mind, in his knowledge, all of the prior acts and sightings of Mr. Douglas at the various places at various times by even police officers and non-police officers. And that was basically explained why and the purpose behind the initial investigation and the various tapings.

THE COURT: That's not what I'm asking you about. What I'm asking you about, from the examination of Mr. Douglas, why should he be questioned about whatever he has done or not done?

MR. ALMAND: Oh. Your Honor, I think, in terms of questioning him about the times and the places, yes, sir. Now, the details of what went on in the car, I have no plans to ask him, 'In the car, what were you doing?' But what I do plan on asking him is his meeting with a female at various times in public places, and I think, you know, that I'm limited to that, but I'm not planning on going into what took place in the car.

[10] THE COURT: Well, we are not going to crucify Mr. Douglas, and the Court is just going to ride all of you about that. It is not relevant to this case as to the history of Mr. Douglas' affair with this female. I'm not talking about what was in the mind of the defendants; now that's another question. Lay that one aside. I'm talking about examining Mr. Douglas as to what he's done and how long it's gone on and that type of thing. We're not trying Mr. Douglas for adultery.

MR. ALMAND: No.

THE COURT: That ain't in this Court's jurisdiction.

MR. ERION: Your Honor, if I may make a comment. I think of primary concern here is my client's state of mind when he ordered the investigation. And I think it is not irrelevant that the reports that he was getting were accurate reports and Mr. Douglas can certainly confirm that. I don't want to go back to five years or ten years or anything like that. I don't even want to go back a year, but I think it is relevant that Mr. Douglas confirm that he had had numerous meetings with this woman in the relatively recent past.

THE COURT: Y'all have stipulated to that.

MR. ALMAND: No, sir, we haven't stipulated to that.

MR. ERION: No, sir, we have not.

[11] MR. WILLIAMS: Stipulated he was involved in sexual activities.

THE COURT: Well anyway, y'all are not going to create a defense by jumping on Mr. Douglas and his history. It's not a defense in this case.

MR. WILLIAMS: Your Honor —

THE COURT: Wait just a minute. I'm talking about Mr. Douglas now. I'm not talking about your client, what he knew or what the reports were to him. Mr. Douglas didn't report anything to him. So there's no conversation between the defendants and Mr. Douglas up until the videotape occurred, so what went on until that point, Mr. Douglas didn't know, so you can't cross examine him about any reports.

MR. ERION: What I'm suggesting, Your Honor, is that this was — all I'm saying is that I'm not trying to ask Mr. Douglas about reports or if he knew about the reports, I do not — I think though that he is — of the people we've got in the Courtroom, he's the best source for confirming the fact that the reports were accurate.

THE COURT: Well, tell you what; when somebody disputes the accuracy of what was reported to your client, we'll recall Mr. Douglas.

MR. ERION: That's fine.

THE COURT: On the government's main case, the [12]

Court's going to draw a line and we're not going into what happened preceding the videotaping. I just don't think there's any dispute about it, there's no relevance to it.

MR. ALMAND: Well, Judge, now —

MR. ERION: Let me say this though, so we'll be clear, if there is no dispute about it, no attempt by the government to dispute in argument or anything, then my basis for it would evaporate immediately.

THE COURT: Yes, sir.

MR. ERION: And I don't have any problem with that.

MR. WILLIAMS: There's no dispute regarding the accuracy of the reports.

MR. ERION: If there comes a point in having argument — at some point inferred in the argument, then I've got a problem.

THE COURT: I understand.

MR. WILLIAMS: I'd like to respond at some point, Your Honor, if I could.

THE COURT: Go ahead.

MR. WILLIAMS: Your Honor, you made a statement there, if there is no such contention in this case and I — I'm not real sure I understood that. I'm real sure I did not understand it. Is the government contending or not that the initial taping, you know, that Frost participated in by being there, was not wrong? I mean —

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[13] THE COURT: No, that's not what we're talking about, George.

MR. WILLIAMS: Well, I — I just missed that. What are we talking about then? I mean, what is — if it's not in contention?

THE COURT: What we're talking about is from a factual standpoint, there's no contention that Mr. Douglas was not meeting with the female.

MR. WILLIAMS: All right. Now, I got that. But I want to —

THE COURT: So you don't need to go into ten years' history to prove that at the end of the tenth year, that the man had another meeting with the woman.

MR. WILLIAMS: Well, let me tell you what I —

THE COURT: You don't need to crucify Mr. Douglas and the woman in question to prove anything in this case for the government or your side either.

MR. WILLIAMS: Let me say this to you; there's been contention just through our discussions and the questions asked of Frost, 'Now, was this a legitimate, criminal investigation you undertook?'

THE COURT: Now, that's another question.

MR. WILLIAMS: But this relates to it, Your Honor. I mean, we are prepared to show that Frost has, for a number of years, as Patrol Commander, received reports from other [14] police

officers that they saw Douglas parked with a female, and I don't even think it was this female. It doesn't — it's not the same description.

THE COURT: Well, George, let me tell you, we're not going into all of that now.

MR. WILLIAMS: I'm not arguing that with you, Your Honor. I just want to get my point across to you and then I'd like to tell you — you know, I'd like not to have my bring my witness down here, if — you know, I don't have to. I mean, y'all let me —

THE COURT: We are not trying Mr. Douglas for adultery. Just lay that aside.

MR. WILLIAMS: I'm not even debating —

THE COURT: If y'all want to indict him in Houston County, go to it.

MR. WILLIAMS I'd like to know —

THE COURT: You're not going to try him in this Court.

MR. WILLIAMS I'm accepting everything you're saying, I just want to be sure that I've stated it to you and I want to be sure that I want to make whatever proffer I should make.

THE COURT: As I understand it, your position is that your client did what he did as a result of orders from his superior, right?

[15] MR. WILLIAMS: That's right, Your Honor, but —

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THE COURT: And he had no intention to engage in a conspiracy, right?

MR. WILLIAMS: That's correct, Your Honor. That's exactly right.

THE COURT: So that's the issue. Now let's stick to that issue.

MR. WILLIAMS All right, sir. Now, as far as —

THE COURT: Douglas' history doesn't prove or disprove that issue.

MR. WILLIAMS Can I just make this as a proffer here now for the record so we can get on back?

THE COURT: Yes, sir.

MR. WILLIAMS: You know, I've got a witness. It's a deputy sheriff with the Sheriff's Department. I can give you the name, it's Robert West, who we would plan to call as a witness to show that within a period of the past eight years, that he's observed Councilman Douglas in the company of a female in a wooded area near the city swimming pool, I believe it's Aquanaut Drive, and that he asked them to leave. He describes the woman as a different-looking woman from what I understand the lady in this case to look like. And I'm just telling you I can produce that evidence and I'm understanding. —

THE COURT: And what would that prove?

[16] MR. WILLIAMS: — you're telling me that I can't.

THE COURT: What would it prove?

MR. WILLIAMS Your Honor, I think it'd prove a lot that's relevant.

THE COURT: What do you mean by "a lot"?

MR. WILLIAMS: I think that if the question of whether or not this was a lawful, criminal investigation is an issue, and maybe it's not, then I think that's relevant. Frost, you know — West reported that to Frost. Frost has known for a number of years that Mr. Douglas has done this kind of thing, and I feel like that that's significant on him responding to what the Chief told him to do. It gets into like this, Your Honor, you got this thing — you've got a strong executive telling Frost what he should do; Frost has got this concern, he's going to be accused of favoring the man because he's a councilman, and, you know, I think that it's relevant to show what the councilman has done in the past. I think that relates very directly on whether or not it's a valid criminal examination. But I'm not arguing with you about that, Your Honor, and I accept your ruling. You know, I would just go forward without it, but I want to make real sure that I do everything I should do to get that in the record, that I'm prepared to prove that.

THE COURT: Well, I understand that all of you would like to go into Councilman Douglas' long history.

* * *

[24] Douglas and those are — you've got to look at both of those and you've got to figure out if you can go from one to the other with a logical flow. And the Chief, regardless of whether he did

it right, did it wrong, did it in ways that were unwise, looking back in retrospect, the Chief was involved in the investigation, but there is nothing in this case that point to his involvement in the mailing, in the federal offense that you're here about today. That's what you're here about; you're not here about how the investigation was conducted. In fact, like Mr. Williams, I expect His Honor to instruct you that the investigation itself was a legitimate police procedure.

What have you got on the Chief after that? The Chief never even spoke to Mr. Douglas about the tape, he never offered to show the tape to Mr. Douglas, he never spoke to Mr. Dempsey about the shoplifting, he was not in any way connected to the extortion note. He, unlike Wiley Bowman, did not alter his tape, he did not alter the original, he did not ask anyone to destroy anything. He turned over everything that he had in his possession to the FBI pursuant to the Grand Jury subpoena. The only thing that didn't get turned over, because he didn't have it and didn't think it existed, was Kathy Mullis' tape. And I'm going to get to that further down the line, but everything — it's never been suggested that he destroyed any evidence. The original was

* * *

[89] exactly.

Q But it was purchased by the City?

A It was subsequently purchased by the City.

Q I believe you said that's about 1,000 feet from City Hall?

A That's my best estimate.

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Q You testified that where you met, I believe in answer to a question from Ms. Duke, you were describing the location as being where you met the lady for lunch?

A Yes.

Q Now, the conduct you and the lady were engaged in was not eating lunch, was it?

A We did eat lunch.

Q But there were other things in addition?

MS. DUKE: Your Honor, I'm going to object to this. I don't think this is relevant.

MR. ALMAND: Now, there is — as I understood it, Your Honor, there was supposed to be a stipulation that we could use, and this witness has opened the door to this question. Now, I didn't raise the question about what he was doing at the time.

THE COURT: Well, there is no question as to what —

MR. ALMAND: Well, he's on —

THE COURT: — the man was doing.

MR. ALMAND: He said, Your Honor, that he was just

* * *

[202] THE COURT: Ladies and gentlemen, one of you asked that a question be propounded as to whether or not this was an acceptable way of doing business.

Of course, the government alleges in the charges that this was not only unacceptable, it was a criminal way of handling the matter. Of course, it's up to you to listen to the evidence and decide who did what, if anything, and why, from a criminal intent standpoint, was it done. So, bear in mind, that's what is the heart of the case. The government alleges that this was all handled in a way that violates the criminal laws of the United States.

MR. ALMAND: Your Honor, please, may we approach the Bench?

THE COURT: Sure.

BENCH CONFERENCE:

MR. ERION: Your Honor, I think if you are going to tell the jury that, that you should add to that that, of course, the government has the burden of proving what they say.

THE COURT: Of course, I've already told them that repeatedly, Mr. Erion.

MR. ERION: With all due respect, Your Honor, I think you told them that at one point before opening statements and —

THE COURT: Yes, sir. Well, this is a very pointed [203] question.

MR. ERION: Well, I know. It goes to an area Your Honor has somewhat restricted our going into, I think.

THE COURT: Well, I think in response to what they asked me that I've said —

MR. ERION: I don't have any problem with —

THE COURT: — as little as ought to be said wouldn't have said anything except for the question.

MR. ALMAND: Well, Your Honor, I object to what the Court said because the way you phrased that, I was trying to think of exactly what you said, the way you phrased it, it leaves out — what you seem to be saying is that if you use a slipshod method of doing an investigation or going about things, that that's criminal.

THE COURT: I didn't say that.

MR. ALMAND: That's the impression that is coming from what you said and the words you used.

THE COURT: No, sir, I don't think so. We're going to fully go over it. Everybody will have a fair opportunity to argue the case.

MR. ALMAND: I understand that, Your Honor, but I want to object at this point to the way you phrased that because it is our contention that this thing is broken into two segments; one was the taping and one was the mailing of the tape.

* * *

[847] appears to me that there is no contention on the governments part that it was a violation of any law to investigate the possibility that William Douglas may have been violating the criminal laws of this state.

MR. WILLIAMS: Your Honor —

THE COURT: Wait a minute. Is there any contention of that?

MS. DUKE: No, sir.

MR. WILLIAMS Well, —

THE COURT: Now wait a minute. Y'all just sit still a minute. So, we're not here to debate the legality of the surveillance of William Douglas. The allegation is that the surveillance, having been completed, that then the fruits of the operation were used for an illegal purpose. So, whether your man took an Oath of Office to do what he did is immaterial and irrelevant. He's clearly authorized by State law to do it, in my best judgment. We're not going to debate all of that.

MR. WILLIAMS: All right, sir. That's a done deal there; you don't want to hear anything else from me about that particular statute on the Oath of Office.

THE COURT: Well, it's just not relevant.

MR. WILLIAMS: Well, I don't agree with you, Your Honor, but if you're telling me don't say anything else, I won't. If you want me —

* * *

[849] things because we understood your instruction was to wait until you dealt with it.

THE COURT: Yes. Well, the reason I have tried to hold the evidence down is because I have heard no contention that the surveillance itself was illegal.

MR. WILLIAMS Is that something — I mean —

THE COURT: And I don't view it as being illegal.

MR. WILLIAMS: Is that the government's position in the case that's going to be somewhat announced by the Court —

THE COURT: I gather that it is.

MR. WILLIAMS: — that there's no contention that that surveillance was illegal?

THE COURT: My intention is to analyze the issues in the case for the jury in plain, common sense language, just like I've been saying.

MR. ALMAND: Well, the problem we've got, Your Honor, is the government has not stood up and said that it was illegal to do it, but by many of the questions they've asked, they have certainly created the inference that that might have been and it's laying there like a ticking timebomb with the questions they asked.

THE COURT: Mr. Almand, I'm going to do my best to explain the issues to the jury in plain, common sense language.

MR. ALMAND: There's another matter —

[850] THE COURT: Now, if y'all want to start debating who could do what, that's a new day.

MR. ERION: Debating who could do what? I didn't understand what you —

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THE COURT: Well, to start with, this took place on land owned by the United States of America.

MR. ALMAND: Under contract to the City.

THE COURT: Yes, sir, but it's within the exclusive jurisdiction of the United States and the way I know that is I had to preside over a murder case that occurred.

MR. ALMAND In this case —

THE COURT: But that's not an issue.

MR. ERION: I beg to differ with you, while we're discussing that, this particular property had been transferred from the United States Air Force to GSA, the government had only proprietary interest in it.

THE COURT Oh, really?

MR. ERION: Yes, sir.

MR. ALMAND: Yes, sir.

THE COURT: Okay. But anyway nobody is debating all this is what I was saying.

MR. ERION: I mean, there had been some contention to that effect in the past, but I think the FBI has given that up.

MR. ALMAND It was all through the search warrant, [851] but other than that —

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THE COURT: Okay, let's go get a bite to eat.

MR. ALMAND: Judge, there's one other question that's going to come up. As I — it is my present plans to tender into evidence the three Georgia statutes, adultery, sodomy, and public indecency.

THE COURT: Immaterial and irrelevant.

MR. ALMAND: Well, Judge, if I can be heard on that?

THE COURT: Well, what are you going to argue from the statute?

MR. ALMAND: Your Honor, the fact is that the question of the investigation in this case and why it was done is here. The jury may well wonder why in the world are they out there doing this for. The government has contended all they were doing was hugging and kissing.

THE COURT: Well, I'll tell you, Hale, what the jurors would be concerned about and I would be if I was sitting on the jury is why William Douglas was singled out as the only person to ever be investigated for adultery.

MR. ALMAND: No, sir. If you look at those reports, through the file, there's a many of them on public indecency.

THE COURT: I see —

MR. ALMAND: There's a number of them on public [852] indecency. That man —

THE COURT You can argue all day long about —

MR. ALMAND: Well, I've got to have the statute —

THE COURT:— why he was singled out.

MR. ALMAND: No, sir, I'm not arguing why he was singled out.

THE COURT: The statute on adultery is not involved in this case.

MR. ALMAND: Well, it goes to the basis for why the investigation was done and it explains the conduct.

THE COURT: Well, I'm going to tell the jury it was legitimately done.

MR. ARMAND: And the fact of what they were doing in that time and place.

THE COURT: They'll be told.

MR. WILLIAMS: I need to ask —

MR. ALMAND: Are you planning on charging those statutes to the jury?

THE COURT: No, sir.

MR. WILLIAMS: I need to ask you about —

THE COURT: We're not going to read all the Georgia law.

MR. WILLIAMS: If I could, Your Honor, I'm asking you because I'll forget it, if I don't cover it now, that's why — I don't mean to be cutting in, but the way I

* * *

[933] did not make the tape and never had the tape. He was in a field across the way from where the tape was made.

THE COURT: No, they're talking about from a knowledge standpoint, ultimately.

MR. SAMMONS: I understand.

MR. WILLIAMS: But you're going to tell them there was nothing illegal about that.

THE COURT: Of the surveillance, yes, sir.

MR. WILLIAMS: Surveillance includes making the tape.

THE COURT: Yes, it does, the original tape.

MR. WILLIAMS Right, yes, sir.

MS. MORROW: One hour, Your Honor, we would like to argue total opening and closing.

THE COURT: How about you all?

MR. WILLIAMS: We want to have just as much time as you can allow us, Your Honor, and I don't really know what that normally is.

THE COURT: Well, there's no normal. Of course, there are three of you and I guess it depends on who is going first because y'all — it becomes repetitious.

MR. WILLIAMS: I'll go first, if y'all want to do that. I'll be content to go first, Your Honor. I went first in the opening. If that's agreeable to them and they want me to do that, I'll still do it.

* * *

[941] MR. ERION: Yes. That's better than I said it, Judge. Thank you.

THE COURT: But other than that, everything's as is, unless y'all want to bring up something?

MR. ALMAND: No, sir. You're going to keep your Motive charge?

THE COURT: Yes, sir.

MS. MORROW: Your Honor, we're using two easels that have charts on them during argument, if we could have just a minute to get that set up before we start our argument?

THE COURT Oh, sure.

MS. MORROW: We didn't want to put it up while you were giving the preliminary Charge.

MR. ALMAND: Also, Judge, we had to go to some extent to get a piece of equipment in this morning, it should — it may even be here now, it's going to take a couple of minutes to hook it up, no more than a couple, that the — Mr. Owen is going to use to demonstrate what he's talking about on a piece of equipment. It's a —

THE COURT: Well, let's go.

MR. WILLIAMS: Your Honor, you're going to cover the surveillance being legit at some point in the first part or second part of your Charge?

THE COURT: The second.

* * *

[980] considering William Douglas among the pool of potential candidates. Mr. Douglas' sexual conduct is incidental to the crimes that have been charged in the indictment before you. Likewise, it is not your charter to ask yourselves about the legitimacy of how the Warner Robins Police Department chose to conduct an undercover surveillance operation. We believe the Judge will instruct you about the legitimacy of that operation when the tape was made.

You may recall that during the government's case in chief, you did not hear word one about how anything deviated from standard operating procedures. It was not until these three defendants chose to suggest the legitimacy of their actions that any sort of attack of that nature was made for the limited purpose of allowing you to assess the credibility of the defendants as witnesses.

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And finally, ladies and gentlemen, it is not your charter, as you review the evidence, to try to figure out what the motives of these three public servants must have been. During the course of this trial, the United States has suggested to you what that motivation must have been, but no one, not one single government witness can take the stand in a criminal case and invade the thought processes of the three, men who sit waiting your verdicts of guilty.

What then must you be persuaded exists in order to return those findings of guilty? Well, you will remember

* * *

[983] conspiracies was the methodology of making a videotape, not just making the tape, producing it, but using it in an unlawful fashion, having recorded William Douglas engaged in sexual activity with a woman not his wife.

The United States suggests to you, ladies and gentlemen, that the best way for you to recall how the burden of proof beyond reasonable doubt has been established as to each and every count of this indictment is to put into a chronological context all of the proof that has come before you. And to assist in that regard, to assist that recollection process, we have prepared a timeline that helps you to recall that proof. Ms. Duke is going to hand each of you an individual copy of the charts that you will see me using as I speak to you during the course of this argument. When you examine the totality of proof you have before you, we're confident that you will conclude you have evidence beyond reasonable doubt as to the guilt of each and every one of the defendants as to each and every count, criminal count with which they are charged.

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You will remember, ladies and gentlemen, at some time before the first of April of 1991, during March in the beginning of that month, Public Works Director Wiley Bowman was informed by his subordinate, Billie Segars, that Mr. Segars had seen Douglas and another woman parked at various spots around Warner Robins, Georgia. Mr. Bowman told you [984] that he did not initially react to that information, and that frankly, is unsurprising. You'll recollect that defense witness, Billie Segars, is the person who said from the witness stand, "If you'll just tell me what you want me to say, I'll be glad to say it."

It wasn't until Mr. Bowman himself, conducting his own form of limited surveillance, noticed Mr. Douglas in a car with another woman, that he decided to act upon that information. The way he acted upon the information, in March and early April of 1991, was to approach Defendant George Johnson, the Chief of Police of Warner Robins. Mr. Bowman told you, ladies and gentlemen, that the Chief was unsurprised by the information he received, not only the observations of Mr. Bowman, but what Mr. Segars had related to his superior. The Chief, this defendant, was already aware, generally speaking, that Mr. Douglas had been spotted in that fashion about Warner Robins proper.

You know that after that point in time, Defendant Gary Frost directed a subordinate police officer, Lieutenant Mac Derrick to drop him off at what has now been described to you as the government property, over off of Myrtle Avenue and Duke Avenue in Warner Robins, with the express purpose of allowing Major Gary Frost, the Chief of the Criminal Investigative Division, to try to record still photographs of Mr. Douglas and this woman.

[985] Now, you'll remember that according to the Grand

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Jury testimony, which Defendant Frost affirmed for you on the witness stand, when he went to make these still photographs on the first occasion, he didn't expect to see Mr. Douglas do anything particularly unlawful. As a matter of fact, he didn't expect that the fruits of his labor were going to be used in any kind of criminal investigation at all. You know that thereafter, the Defendant Frost directed Lieutenant Mac Derrick to surveil himself the woman who had been seen with Mr. Douglas. Lieutenant Derrick told you that he did that by traveling to Robins Air Force Base, positioning himself in a parking lot, and trying to detect this woman as she left work, what her ordinary and routine habits happened to have been.

You know that after that point in time, the decision was made for Wiley Bowman, the Director of Public Works, to make an effort to videotape whatever it was that Mr. Douglas and this woman were doing in a car on the government property. Now, contrary to what has been suggested to you, this wasn't some personal undertaking on behalf of Mr. Bowman. You will remember that during this first trip, before the 16th of April, Bowman traveled in the company of Defendant George Johnson, the Chief of Police, in a van which the Chief of Police had asked Bowman and his assistant, Mr. Segars, to secure. You will remember that [986] while they were driving about Warner Robins, they heard radio traffic from Defendant Gary Frost, saying "I've spotted them. They're over at the government property," and that is where the group re-paired. You know that at point in time, using his personal camera equipment, Mr. Bowman made a videotape which was not very successful, which was not of good quality. And at that point in time, the group made a decision to try to use better equipment that was within the inventory of the Warner Robins Police Department to produce a better product.

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You have before you Government Exhibit #3, the original 8 millimeter videotape, and you know from that single exhibit, that on the 16th of April of 1991, a tape recording was made. You know that Mr. Bowman picked up a camera from the Warner Robins Police Department either that morning or the day before. You know that Defendant Frost and Bowman then traveled back to the government property where, as planned, Mr. Bowman, aiding and abetting the defendants in this case, acted as camera operator of the video equipment, and Defendant Frost, as planned, acted as the still photographer, making yet another effort to make photographs of Mr. Douglas and another woman parked in the car.

You know that after the videotape was made, Mr. Bowman had other plans for the afternoon. He was already committed to attend a funeral, so what did he do? He delivered the original 8 millimeter videotape, Government [987] Exhibit 3, in the camera to the custody of Defendant George Johnson. And it is at that point in time, ladies and gentlemen, on the 16th of April, that Wiley Bowman had no further access to the original tape which had been recorded.

You know that at the direction of Defendant George Johnson, the Chief of the Special Investigative Unit, A.J. Mathern was commissioned to take that small 8 millimeter videotape and reproduce it in a larger VHS format for Defendant Edward Wayne Martin. What did Defendant Johnson have to tell you about that reproduction process? Well, if you'll recollect, he said that he had an opportunity to review the contents of that tape in the privacy of his office at the Warner Robins Police Department before ever traveling to City Hall. He told you, ladies and gentlemen, that based upon his independent review of that tape, he didn't see any unlawful or illegal conduct. Asked

why then he would take that tape and go to his boss' office, the Chief Executive of the City of Warner Robins, for yet another review, the only answer that Defendant George Johnson could give you was, 'Well, gee, I thought it was something that the boss ought to see.'

And you know that's exactly what happened. You know that a group of people traveled on the afternoon of the 16th of April to the offices of Defendant Edward Wayne Martin. That group included the Chief of Police, the Head of [988] his Criminal Investigative Unit, the Director of Public Works, and his assistant, joined by Mayor Ed Martin.

What happened during the course of that afternoon? Well, there isn't any dispute about who was there or the fact that the videotape was reviewed. You heard from Chief Johnson that the only reason they went in the first place was just to let the boss have a look at what had been collected. Well, ladies and gentlemen, you know what the unexplained purpose of going to the Mayor's Office that afternoon really was. It wasn't to examine something the Police Department had created for its possible prosecutive value; the purpose was to take over a tool that was later to be used in an attempt to extort a City Council seat from Councilman William Douglas.

You know that following that meeting in Mayor Martin's Office, beginning on the 16th of April, that same day, and up to the 19th of April, the day that the tape was actually mailed to Councilman Douglas, according to the postal records which you have, A.J. Mathern was commissioned to make additional copies of the original tape. He was told to make an additional copy first for Chief Johnson's personal use and then, on approval of Chief Johnson, a copy for Wiley Bowman to review in the privacy of his

home. So, you know that at that point in time, at the time the videotape was mailed to Mr. Douglas through the United States mail, three

* * *

[1010] you, the firefighter; you, the retail businessmen; you, the homemakers, to the evidence that you have heard and when you do that, we're confident that you will believe that instead of giving a politician the keys to the city, it might have been a better idea to have changed the locks, at least in Warner Robins, Georgia, during the reign of Defendant Gary Frost, Defendant George Johnson, and Defendant Edward Wayne Martin. They're guilty. Don't let them get away with it.

(DEFENSE ARGUMENTS HEARD BY THE COURT AND JURY)

MS. DUKE: Ladies and gentlemen, as I listened to Mr. Almand, one of the things I wholeheartedly agree with him is that our criminal justice system is based upon the proposition of reasonable doubt, but that is not a new proposition. It is one that every prosecutor in every State of the Union in every day has had to meet and will meet forever, as long as our Constitution is in existence. And it is that burden that Ms. Morrow and I realized, and that we brought into this Courtroom and we were ready to meet and that we have met for you ladies and gentlemen.

As Mr. Almand said, and as Mr. Erion said, this is not a case involving whether or not William Douglas was or was not having an affair with another woman; that is not the issue. This case is about the misuse and abuse of power and position. It is about the misuse of that power. It is about a witchhunt by three men who

stalked and photographed and [1011] attempted to persecute a citizen that they were sworn to protect. That is why we are here.

Now, as Ms. Morrow told you and as the Judge will charge you, the defendants are charged with a conspiracy, and it is that conspiracy, it is the coming together of the defendants for an unlawful purpose that forms the crux of this case. The charges of the attempt to interfere with commerce, the mailing of the communication, the extortion letter, and then the attempts to hide what they did then resulted from that conspiracy.

When judging the defendants' participation and intent in that conspiracy, you must look at the totality of all the circumstances, not isolated instances of conduct that Mr. Erion and Mr. Williams and Mr. Almand would like you to look at, but of the entire events from start to finish, from April of '91 all the way through May of '93.

There is no question in this case, never has been, that a video was made, that the defendants participated in the making of that video. There is no question that a copy of that video was mailed to Mr. Douglas and that that video was mailed to him with a note demanding that he resign from City Council or that it be made public. There's no question of that. The only questions before this Court and before you are who did it. Who mailed the video and who mailed the note? As Ms. Morrow said, and as the defense attorneys have [1012] reiterated, the question of the legitimacy of the investigation that these defendants purportedly did to attempt to get this video is not an issue. It is not an issue as to the legality of the mailing of the tape and the note that was with it. The legitimacy of the investigation only becomes an issue when you must examine the testimony of the defendants, Gary Frost and George Johnson, because it is through their testimony that

the claim was made that the videotape was obtained in a legitimate investigation. And when you assess the legitimacy of that investigation, again, you must look at the totality of the circumstances and what was done in that regard.

George Johnson and Gary Frost say the stalking of Mr. Douglas and the photographing of him was done for a legitimate investigative purpose. 'It had been brought to our attention that Mr. Douglas was having open sexual conduct with this woman in Warner Robins.' If you look at the evidence, the only evidence of Mr. Douglas' conduct was brought forward by Wiley Bowman in which he said — and Billie Segars, that Mr. Douglas had been seen around town; and yes, he had. He had been seen sitting in a car at the Piggly Wiggly; nothing illegal about that. He had been seen at Memorial Gym reading a book; nothing illegal about that. And he had been seen sitting in a car with a woman: nothing illegal about that. But yet, despite all that information [1013] that Mr. Douglas was not doing anything illegal, and, in fact, one of the reports that the defense attempts to use to show the legitimacy, as they purport to be of the investigation, says that exact thing: "Mr. Douglas and this woman have never been doing anything wrong."

But yet, according to the defendants, Frost and Johnson, they initiate an investigation. And if you look in judging their credibility and how that investigation was done, you will see that it was not legitimate, and, in fact the stalking and the videotaping was done for the purpose for which it was used, which was the extortionate nature and note sent to Mr. Douglas. Nothing about that investigation was legitimate from start to finish. It was not documented in any way, as the Police Department would have documented any normal file, and, in fact, in nine years as being Police Chief, George Johnson testified that there had never been

a case involving the sexual conduct of two consenting adults in a car. Gary Frost said the same thing, that there had never been such an investigation. Yet, despite that, these defendants marshalled the resources under their direction of the Police Department and stalked and videotaped Mr. Douglas.

In support of their claim of legitimacy, the defendants present to this Court and to the government, a purported file that George Johnson purportedly had to document the actions of the Police Department. Again, it is

* * *

[1021] specific questions about his involvement in any criminal investigation of Mr. William Douglas, and to repeated questions, he answered, "There was no criminal investigation. I did not think I was partaking in a criminal investigation. I didn't think that I was going to see Mr. Douglas do anything wrong. I didn't think that the photographs that I would be taking would be used in a criminal prosecution." Yet, before you ladies and gentlemen, he testifies that, yes, indeed, he thought it was a criminal investigation, and went so far as to embellish it further as to say that he was concerned about the job of the woman who was with Mr. Douglas, and that perhaps she was leaking sensitive information to the Base. Again, testimony that conflicted with his sworn Grand Jury testimony and conficted with the testimony of George Johnson, who never believed that.

Frost relies, or Frost attempts to rely for his behavior on the defense of "I was following orders. I was told to do what I did." That is the same defense that was used at Nuremberg, it was the same defense used in Vietnam. Gary Frost is not a rookie cop. He is not a cop who didn't know what he was doing. He is second in

command at the Warner Robins Police Department. He made a choice to do the bidding of that person who held the key to his job, George Johnson. Perhaps it was a hard choice for Gary Frost, but it was a choice and he made it, just as George Johnson made the

* * *

[1032] this case.

What the evidence has shown in this case, ladies and gentlemen, are men who are sworn to uphold the laws of the State and to protect the citizens under their protection. These men have placed themselves above that law and their responsibility. What they did to Mr. William Douglas and what they would have done to others is no different than what the Gestapo did in World War II. It is no different than the authorities in Third World countries do to the people under their protection.

MR. ALMAND: May it please the Court, that's going too far. I object to going that far, making those comparisons to Nazis. That's not in this case. I think that's way out of bounds.

THE COURT: Stick to this case, please, ma'am.

MR. WILLIAMS: And, Your Honor, may we approach on that?

THE COURT: Mr. Williams, the District Attorney is about to finish argument. I'll be glad to hear from you after she does.

MS. DUKE: When I was a child, growing up in Georgia, my father instilled in me a great, deep and abiding respect for those people who are sworn to uphold the law and to carry the public

trust. It is with deep regret that Ms. Morrow and I have had to stand before you for the past week [1033] and have had to put forth the facts and circumstances of this case. It is with deep regret that we both must ask you to return a verdict that the evidence requires, and that is guilty. But we do so because the evidence does require it, but more importantly, if those who do enforce the law do not respect and obey the law, then we cannot expect anyone else to do so. If the law is to be honored, it must first be honored by those who are sworn to enforce it.

Thank you.

THE COURT: All right, we're going to take a break, ladies and gentlemen, before you hear the remainder of the Court's Charge. Everybody stay where you are, please, while the jurors go out.

JURY OUT OF COURTROOM AT 2:55 P.M.

THE COURT: Mr. Williams, you wanted to bring up something?

MR. WILLIAMS: Yes, sir, you want me to come up there, Your Honor, or do it from here?

THE COURT: Right there will be fine.

MR. WILLIAMS: I'd like to move for a mistrial based upon prosecutorial misconduct, Your Honor. I think that the government attorney was continually making reference to the defendants in the case, words being Nuremburg, Vietnam, Gestapo, and so forth. I think that goes beyond anything that's reasonable. I'd like to renew my motion for [1034] a directed

verdict based upon the Court not allowing me to use the testimony of Bobby Brantley.

THE COURT: You don't — that's not appropriate at this time, Mr. Williams.

MR. WILLIAMS: When will it be, Your Honor?

THE COURT: Well, you've made the motion —

MR. WILLLIAMS I'd like to —

THE COURT: You do not have to renew it. We're not here to rehash what's already gone on now.

MR. WILLIAMS: I'd like to get it in the record, Your Honor.

THE COURT: Well, it's in the record repeatedly, Mr. Williams, and you don't have to keep repeating what we've already taken up. Nobody has to do that.

MR. WILLIAMS Yes, sir. I'd like to continue and move to something else.

THE COURT: What else?

MR. WILLIAMS: I'd like to except to the — I respectfully except to the ruling just made because I think you should allow me to explain it.

THE COURT: Mr. Williams, the federal appellate decisions don't require you to repeat constantly the things that have already been urged upon the Court and dealt with.

MR. WILLIAMS I'm just ready to move to something else, Your Honor.

[1035] THE COURT: If it's something new, I'll be glad to hear from you.

MR. WILLIAMS: All right, sir. I've got something new, Your Honor.

THE COURT: All right, what is that, please?

MR. WILLIAMS: I'd like to make a motion for a mistrial based on the State's intentional misstatement of the evidence. I know you say that the jury can recall, but I think if we're going to make anything out of it, we need to make a record on it. I am absolutely sure there was no mention of Victor Erwin by my client. I think that for the government to make reference to my client could've called Victor Erwin, who he knew he took up the mail, is totally improper. He never knew such a thing, he never said any such thing. The government's attorney commented about him lying before the Grand Jury; I think that was prosecutorial misconduct. I think she tried to insert a portion of the Grand Jury for that purpose; it was not used to impeach or attempt to impeach my client in the trial. The Court challenged me for talking about that an arrest couldn't have been made —

THE COURT No, sir.

MR. WILLIAMS: — and the Court —

THE COURT: About probable cause.

MR. WILLIAMS: Yes, sir.

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[1036] THE COURT: You suggested that there was —

MR. WILLIAMS: If I could continue, Your Honor?

THE COURT: — probable cause to prosecute him and that's not an issue in this case. We talked about it umpteen times.

MR. WILLIAMS: But the government did the very same, thing, Your Honor.

THE COURT No, they didn't say —

MR. WILLIAMS: They said they could not have made an arrest, could not have done what was said could be done. She did that, Your Honor.

THE COURT: Well, you can certainly contend that. Anything else?

MR. WILLIAMS: Bear with me, Your Honor. She makes a reference to — continually makes reference to improper parts of the surveillance and it is my understanding that the Court has already made a ruling that the surveillance was legal.

THE COURT: Yes, sir.

MR. WILLIAMS: I think that's improper, I'd move for a mistrial because of it.

THE COURT: Anything else?

MR. WILLIAMS: That's it.

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THE COURT: You wanted to say something, Mr. Erion?

MR. ERION: You want to rule on his?

[1037] THE COURT: Go ahead, if you'd like.

MR. ERION Your Honor, I join in what Mr. Williams said and let me go down to what I'm going through here and I'll get to the end.

In addition, if a mistrial is not granted, I specifically ask to be allowed to re-argue certain points that Ms. Duke misstated that were brought out and not properly rebutted. She said that I said in argument that Mr. Mathern had marked the tape on April 24th, and Mr. Mathern had testified to me on cross examination that he had not put any marks on the tape. That is an accurate statement of Mr. Mathern's testimony, an inaccurate statement of what I said to the jury. What I said was my client said he received the tape on April 24th and that's why he marked the tape on April 24th and made the memo on April 24th. She said that — well. She argued that the Chief fabricated the file last December, couldn't remember the date. I didn't argue anything about — that would've brought that on at all; it was not proper rebuttal. Of course, I guess the jury's got sense enough to know that if he wanted to know the tape was made, he could have simply looked at the tape.

But she said that Mr. Johnson said regarding Mr. Hart's alleged conversation with him, 'I don't remember that conversation.' That was not the testimony. He did not say, 'I don't remember that.' He said either — I think he said, [1038] 'I don't recall that happening,' or something like that, much stronger than 'I don't remember.'

THE COURT: What's the difference in, 'I don't recall,' and 'I don't remember'?

MR. ERION: There is an awful lot of difference in the connotation of 'I don't remember' and 'I don't recall that.' 'I don't recall that' is just like saying I don't recall that happening, that didn't happen. Complete difference in connotations. And again, it's not proper rebuttal. I never addressed what my client said during that statement in my argument. I addressed the credibility of Major Hart. Remember'?

THE COURT: What's the difference in, "i don't recall,' and 'I don't remember'?

MR. ERION: There is an awful lot of difference in the connotation of "I don't remember' and 'I don't recall that.' 'I don't recall that' is just like saying I don't recail that happening, that didn't happen. Complete difference in connotatios. And again, it's not proper rebuttal. I never addressed what my client said during that statement in my argument. I addressed the creditability of Major Hart.

And then she again referred to — keeps referring to the phrase, "sending a copy to Kathy Mullis" and that's not the evidence from Ms. Mullis or my client. That is a critical aspect of the case and I object to it.

THE COURT: You want to add anything, Mr. Almand?

MR. ALMAND: Your Honor, I want to add on the question of mistrial for the prosecutorial abuse in the comparisons to Nazi Germany and South America and Vietnam. I think that is so highly prejudicial and so uncalled for in this case that there is no

way that that could be removed from the minds of the jury, and I definitely join in the request for a mistrial on that.

THE COURT: Well, ladies and gentlemen, all of you [1039] have been engaged in argument. It's tit for tat from what the Court listened to. The jury has been admonished that what lawyers say is not evidence, they are the judges of the facts and of the guilt or innocence of everybody who is on trial. There's no basis for a mistrial. It's not for this Court to analyze and flyspeck and try to decide whose argument is exactly supported by the evidence and isn't. That's for the jury to do. This judge is not the finder of fact. If I were, I would make a finding real quick, wouldn't be any problem, but that's not my responsibility or privilege, so I cannot grant any of the motions. We'll take short recess before we continue.

COURT RECESSED AT 3:05 P. M.

[1040] COURT RESUMED, JURY IN COURTROOM AT 3:15 P.M.

OFFENSE CHARGE TO THE JURY

Ladies and gentlemen, you have listened to more than three hours of argument. I want to remind you again that what the lawyers say or said is not evidence. Their recollection of what the evidence was is not evidence. You ladies and gentlemen are the sole and only judges of what the evidence is that has been presented to you during this trial. You rely solely and only upon what you remember the evidence to be and not upon what any lawyer, prosecutor or defendant's lawyer, said the evidence was.

Now, in this case, it is undisputed that the Warner Robins

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Police Department, assisted by other City employees, conducted an investigation of William Douglas' suspected criminal behavior. It's also undisputed that Mr. Douglas was never prosecuted as a result of that investigation. Under Georgia law, police officers have the right to investigate anyone who is suspected of engaging in criminal behavior. Police officers, however, do not have the right to use the results of such an investigation for an illegal purpose. The first three charges of this indictment allege that these defendants used their investigative authority, the results of their investigation for an illegal purpose. It is not for you ladies and gentlemen to determine whether, in truth and fact, Mr. Douglas was engaged in criminal activity or whether

* * *

[1056] concerning some material matter in the Grand Jury proceeding; third, that such false testimony was knowingly and willfully given by the defendant who is charged.

Now, testimony, ladies and gentlemen is false if it was untrue when it was given and was then known to be untrue by the witness or person giving it. A statement contained within a document is false if it was untrue when used and was then known to be untrue by the person using it.

The materiality of the matter involved in the alleged false testimony in each charge is not a matter with which you ladies and gentlemen are concerned, but rather, under the laws of the United States, is a question for Court to decide. You are instructed that the questions asked each defendant, as set forth in the charges, constituted material or important matters in the Grand Jury proceedings referred to in each charge.

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Now, in reviewing the testimony which is charged to have been false, you should consider that testimony in the context of the series of questions asked and answers given land the words used should be given their common and ordinary lmeaning, unless the context clearly shows that a different meaning was mutual understood by the questioner and the witness.

If you should find a particular question was ambiguous or capable of being understood in two different

* * *

Supreme Court, U.S.
FILED
DEC 6 1996

No. 96-538

In the Supreme Court of the United States

OCTOBER TERM, 1996

GARY FROST AND GEORGE JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the term "thing of value" as used in 18 U.S.C. 876 includes a salaried position as a city councilman.

2. Whether an anonymous note threatening to expose embarrassing information if an elected official does not resign constitutes "wrongful" conduct subject to 18 U.S.C. 876.

3. Whether the government's references to Nuremburg and the Gestapo in its closing argument rendered petitioners' trial fundamentally unfair.

4. Whether the jury instructions fairly and adequately addressed the issues at trial.

5. Whether petitioner Johnson's perjury conviction should be reversed under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), even though petitioner did not challenge the trial court's failure to submit the issue of materiality to the jury until after the court of appeals had issued its decision.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 10a-32a) is reported at 61 F.3d 1518. The opinion of the court of appeals modifying its original opinion (Pet. App. 5a-9a) is reported at 77 F.3d 1319.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1995, and modified on March 19, 1996. Suggestions for rehearing en banc were denied on June 6, 1996.[1] Pet. App. 1a-2a. The petition for a writ of cer-

[1] Under Eleventh Circuit Rules 35-6 and 35-7, a suggestion for rehearing en banc is treated as a petition for panel rehearing and stays issuance of the mandate until it is decided.

tiorari was filed on September 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioners Gary Frost and George Johnson were convicted of attempting to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951; of conspiracy to commit extortion by use of the U.S. mails, in violation of 18 U.S.C. 371; and of extortion by use of the U.S. mails, in violation of 18 U.S.C. 876. In addition, Johnson was convicted of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. Frost was sentenced to 33 months' imprisonment, to be followed by three years' supervised release. Johnson was sentenced to 51 months' imprisonment, to be followed by three years' supervised release. On appeal, the court affirmed petitioners' convictions but reversed their sentences and remanded to the district court. Pet. App. 10a-32a. The court of appeals later amended its opinion to reverse petitioners' convictions for attempting to obstruct interstate commerce by extortion. *Id.* at 5a-9a. Frost was resentenced to 14 months' imprisonment, to be followed by three years' supervised release. Johnson was resentenced to 18 months' imprisonment, to be followed by three years' supervised release.

1. In 1988, Edward Wayne Martin was elected Mayor of Warner Robins, Georgia. Pet. App. 12a. At that time, petitioner Johnson was the police chief of Warner Robins, and petitioner Frost was a major in the police department. *Ibid.* While in office, Martin clashed with William Douglas, a member of the Warner Robins City Council. In late 1990, Douglas

drafted, and the council passed, several ordinances that reduced the Mayor's spending authority. *Ibid.*; Gov't C.A. Br. 6.

Sometime before April 1991, Wiley Bowman, Warner Robins' Director of Public Works, learned that Douglas was meeting with a woman (not his wife) at various locations around the city. Bowman discussed that fact with Martin and Johnson. Martin asked Bowman if he could prove that Douglas was having an affair; Bowman and Frost subsequently made a videotape of Douglas and the woman, using a police video camera supplied by Johnson. Gov't C.A. Br. 8-9. Johnson then made two copies of the tape and—after viewing the tape in Martin's office with Bowman, Frost and others—gave a copy to Martin. *Ibid.*; Pet. App. 13a.

Six days later, on April 22, 1991, Douglas received a copy of the videotape in the mail at City Hall, along with a handwritten note (on which Martin's fingerprint was later found) threatening to give a copy of the tape to the mayor and Douglas's wife if Douglas did not resign from the city council immediately. That same day, Frost asked the city employee who delivered the package about Douglas's reaction, and stated that he (Frost) "bet [Douglas] was upset." Johnson was present during that conversation. Pet. App. 12a-13a; Gov't C.A. Br. 10. On May 1, 1993, Martin called Douglas to his office and told him that he had received a copy of the videotape in the mail. Later, Martin told Douglas that if Douglas resigned, "maybe they won't send a copy to your wife." Pet. App. 13a. In early 1992, Johnson told another police officer that Douglas would not be running for Mayor because "[w]e have a tape, a videotape of Douglas and his girlfriend in a car[.]" *Id.* at 14a-15a. Nonetheless,

in January 1993, Johnson appeared before the grand jury and falsely testified that he had left a particular copy of the videotape at his house, where, he added, it might have been taped over. In fact, Johnson had given the tape to a former employee. Gov't C.A. Br. 32-34.

2. Petitioners and Martin were indicted for their roles in the mailing of the videotape and note; Johnson was also indicted for perjuring himself before the grand jury. Pet. App. 11a. The jury returned guilty verdicts against all defendants on all counts.

3. The court of appeals affirmed in part, reversed in part, and remanded for resentencing. Pet. App. 5a-32a. The court rejected petitioners' claim that the government's closing argument required a mistrial. Although the court noted that the prosecutor's reference (in her rebuttal closing) to Nazi Germany was "ill-advised,"[2] it concluded upon review of the

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[2] Towards the end of her rebuttal closing, the prosecutor told the jury:

> Frost relies, or Frost attempts to rely for his behavior on the defense of "I was following orders. I was told to do what I did." This is the same defense that was used at Nuremberg, it was the same defense used in Vietnam. Gary Frost is not a rookie cop. He is not a cop who didn't know what he was doing[.]

Gov't C.A. Br. 48. Defense counsel made no objection to the argument. Further into the rebuttal argument, the prosecutor stated:

> What they did to Mr. William Douglas and what they would have done to others is no different than what the Gestapo did in World War II. It is no different than the

comment in context and the entire record that the remarks did not render the trial fundamentally unfair. *Id.* at 22a. The court of appeals also rejected petitioners' challenge to the jury instructions regarding the legality of the surveillance of Douglas. The court concluded that those instructions fairly and adequately addressed the issues and correctly stated the law. *Id.* at 24a. Because it determined that the district court had applied the wrong sentencing guideline, however, the court of appeals remanded for resentencing. *Id.* at 32a.[3]

Johnson then filed a suggestion for rehearing en banc, contending, for the first time, that the district court had erred in failing to submit to the jury the issue of whether his false statements to the grand jury were material. Frost also filed a suggestion for rehearing en banc. While those filings were pending, the court of appeals modified its original opinion to hold that the evidence at trial failed to show a sufficient link between the attempted extortion and interstate commerce, and it therefore reversed defendants' convictions under 18 U.S.C. 1951. Pet. App. 5a-9a. Frost and Johnson then renewed their suggestions for rehearing en banc, which were denied on June 6, 1996.

> authorities in Third World countries do to the people under their protection[.]

Ibid. When defense counsel objected, the court admonished the prosecutor to "[s]tick to this case." *Ibid.*; Pet. App. 67a.

[3] The court of appeals also rejected many arguments that petitioners do not renew in this Court. Pet. App. 17a-29a.

DISCUSSION

1. Petitioners argue (Pet. 6-9) that they did not commit extortion because Douglas's position on the city council was not a "thing of value" under 18 U.S.C. 876, which makes it unlawful knowingly to deposit in the U.S. mail, "with intent to extort from any person any money or other thing of value," any communication "addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another." According to petitioners, the term "thing of value," should be interpreted to mean "property," which in turn should be narrowly construed (under petitioner's view of Georgia law) to exclude an intangible right to hold public office. That claim is without merit.

Even if the term "thing of value" in 18 U.S.C. 876 were confined to "property interests" to which due process protections would attach—a proposition for which petitioners cite no authority—petitioners' argument would fail on its own terms: Whether or not officials elected to state or local office have a "vested" right to compensation under Georgia law (see Pet. 7), petitioners concede that Douglas, who drew a salary as a city councilmember (see Gov't C.A. Br. 15), did have a property interest in his position sufficient to trigger due process protections. Pet. 7; see *City of Ludowici* v. *Stapleton*, 375 S.E.2d 855, 856 (Ga. 1989) ("We recognize that '[a]n elected city official who is entitled to hold office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process.'") (quoting *Crowe* v. *Lucas*, 595 F.2d 985, 993 (5th Cir. 1979)); see also *United States* v. *Gorman*, 807 F.2d 1299, 1305 (6th Cir.

1986) (offer of employment is a "thing of value" under 18 U.S.C. 201(g)), cert. denied, 484 U.S. 815 (1987).[4] In any event, Douglas's elected position plainly constituted a "thing of value" under Section 876. As used in that statute, the term has been expansively construed to include a broad variety of tangible and intangible matters. *United States* v. *Nilsen*, 967 F.2d 539, 542-543 (11th Cir. 1992), cert. denied, 507 U.S. 1034 (1993); *United States* v. *Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974); *United States* v. *Scott*, 884 F.2d 1163, 1166 (9th Cir. 1989), cert. denied, 506 U.S. 901 (1992); see also *United States* v. *Schwartz*, 785 F.2d 673, 679-680 (9th Cir.), cert. denied, 479 U.S. 890 (1986); *United States* v. *Croft*, 750 F.2d 1354, 1361-1362 (7th Cir. 1984); *United States* v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979).[5]

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[4] Petitioners (see Pet. 9) rely on cases involving the terms "thing of value" and "property" in a different statute, 18 U.S.C. 641, which addresses the theft or conversion of government property. Those cases do not support petitioners' argument. Two of them—*United States* v. *Matzkin*, 14 F.3d 1014, 1020-1021 (4th Cir. 1994), cert. denied, 116 S. Ct. 175 (1995), and *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.), cert. denied, 444 U.S. 871 (1979)—affirmed convictions under Section 641 on the ground that that provision covers a broad range of tangible and intangible property interests; Douglas's interest in retaining his position falls well within that range. Although *United States* v. *Tobias*, 836 F.2d 449 (9th Cir.), cert. denied, 485 U.S. 991 (1988), did conclude that Section 641 does not apply to "intangible goods" such as classified information, the Ninth Circuit based that conclusion on the legislative history of that particular statute, 836 F.2d at 451 n.2, which is, of course, inapplicable here.

[5] Petitioners also claim that interpreting the phrase "thing of value" to include a salaried position renders Section 876 either vague or overly broad. Pet. 8, 10. Because petitioners failed to raise those constitutional challenges below, they are

2. Petitioners also challenge their extortion convictions on the theory that the note they sent to Douglas did not seek an inherently "wrongful" objective, but was "merely intended to make Mr. Douglas resign from a position in which he held no vested interest and was in no way intended to obtain anything for the communicator of the threat." Pet. 11. That argument is also without merit.

Petitioners appear to rely on cases interpreting the Hobbs Act, which defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2); see Pet. 10 (citing *United States* v. *Buffey*, 899 F.2d 1402 (4th Cir. 1990)). Under that statute, however, a conviction for extortion does not require that the extortionist actually obtain anything of value for himself, because "the gravamen of the offense is loss to the victim." *United States* v. *Hyde*, 448 F.2d 815, 843 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); see also *United States* v. *Lance*, 536 F.2d 1065 (5th Cir. 1976). It is similarly irrelevant to the validity of petitioners' convictions under 18 U.S.C. 876 that they did not

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not properly presented here. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event, because the term "thing of value" is commonly understood to include intangibles, it is not so vague that ordinary persons cannot understand what conduct is prohibited. *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Nor is the statute, which reaches only extortionate speech, subject to challenge on overbreadth grounds. *United States* v. *Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988); see also note 6, *infra*.

themselves seek the city council position that they tried to force Douglas to vacate.[6]

3. Petitioners contend (Pet. 12-17) that the government's closing argument was unduly prejudicial. Both of the lower courts considered and rejected that claim. In particular, the court of appeals concluded, after examining the record in its entirety, that the prosecutor's references to Nazi Germany in her closing argument did not render the trial fundamentally unfair. Pet. App. 22a. Petitioners identify no reason why this Court should reconsider that factbound determination.

4. Petitioners also assert (Pet. 17-21) that the district court deprived them of their "Sixth Amendment right to effective argument" by failing to instruct the jury that the surveillance of Mr. Douglas was legal. The district court did, however, instruct the jury that:

> it is undisputed that the Warner Robins Police Department, assisted by other City employees,

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[6] Likewise unavailing is petitioners' claim that their conduct was protected under the First Amendment. Extortionate threats are not, without more, "speech" entitled to constitutional protection. *United States* v. *Hutson*, 843 F.2d 1232, 1235 (9th Cir. 1988); *United States* v. *Bellrichard*, 994 F.2d 1318, 1321-1323 (8th Cir. 1993), cert. denied, 510 U.S. 928 (1993); *United States* v. *Quinn*, 514 F.2d 1250, 1268 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976); see also *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992). Petitioners rely for their contrary position on *Wurtz* v. *Risley*, 719 F.2d 1438 (9th Cir. 1983), a decision striking down a Montana intimidation statute on overbreadth grounds. The Ninth Circuit has declined, however, to reach the same result under Section 876, citing the "major differences" between the two statutes. *Hutson*, 843 F.2d at 1234.

> conducted an investigation of William Douglas' suspected criminal behavior. It's also undisputed that Mr. Douglas was never prosecuted as a result of that investigation. Under Georgia law, police officers have the right to investigate anyone who is suspected of engaging in criminal behavior. Police officers, however, do not have the right to use the results of such an investigation for an illegal purpose.

Pet. App. 74a-75a. That instruction plainly informed the jury that the investigation of Mr. Douglas, who was undeniably engaging in adultery, was legal. Thus, petitioners' claim that the jury instructions were constitutionally inadequate is without foundation.

5. Finally, Johnson contends (Pet. 21-22) that the court of appeals erred in failing to reverse his perjury conviction under *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995). In *Gaudin*, this Court held that the Constitution requires a trial court to submit the issue of materiality to the jury when it is an element of a charged offense. Here, Johnson did not request a jury instruction on materiality, and none was given. Moreover, although *Gaudin* was decided on June 19, 1995, Johnson did not seek to amend his brief or otherwise raise a *Gaudin* claim before the panel's original decision was issued on August 25, 1995. Instead, Johnson raised his *Gaudin* claim for the first time in a suggestion for rehearing en banc, which was denied.

The record does not indicate why Johnson's request for rehearing on the *Gaudin* claim was denied. The court of appeals may well have determined that Johnson had waived his *Gaudin* claim by failing to

raise it in a timely manner on appeal. See *Moore* v. *United States*, 598 F.2d 439, 441-442 (5th Cir. 1979) ("Absent exceptional circumstances, this court will not consider new matters raised for the first time in a petition for rehearing.") It is also possible that the court considered that claim and found that it lacked merit. In particular, the Eleventh Circuit has determined, in accordance with all other circuits that have addressed the issue except the Ninth (see *United States* v. *Keys*, 95 F.3d 874 (9th Cir. 1996) (en banc)), that *Gaudin*-type errors are subject to plain error review under Fed. R. Crim. P. 52(b). See *United States* v. *Kramer*, 73 F.3d 1067, 1074 (11th Cir.), cert. denied, No. 96-607 (Dec. 2, 1996). It is possible, therefore, that the court of appeals applied the plain error standard to Johnson's claim and concluded that it was not satisfied.

Because of that possibility, this case should be held pending this Court's decision in *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), which involves the appropriateness of plain-error review of *Gaudin*-type errors. If this Court were to conclude in *Johnson* that plain error analysis is never appropriate to review such errors, the Eleventh Circuit might wish to reconsider its decision denying petitioner's rehearing petition. On the other hand, if this Court affirms the approach of the Eleventh Circuit and concludes that plain error analysis is appropriate in reviewing *Gaudin*-type errors to which a defendant did not object at trial, the petition should be denied.

CONCLUSION

As to the first four questions, the petition for a writ of certiorari should be denied. As to the fifth question, the petition should be held pending this Court's decision in *Johnson* v. *United States*, cert. granted, No. 96-203 (Nov. 15, 1996), and then disposed of accordingly.

Respectfully submitted.

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